SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 318

JOHN A. BURNS, GOVERNOR OF THE STATE OF HAWAII, APPELLANT,

vs.

WILLIAM S. RICHARDSON, ET AL.

No. 323

ELMER F. CRAVALHO, ET AL., APPELLANTS,

vs.

WILLIAM S. RICHARDSON, ET AL.

No. 409

KAZUHISA ABE, ET AL., APPELLANTS,

vs.

WILLIAM S. RICHARDSON, ET AL.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

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[fol. 3]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

Civil No. 2308

HENRIETTA DAVIDSON HOLT, JAMES ROBINSON HOLT, CARL J. GUNTERT, ELMER G. LEEHMAN, JOHN J. MEDEIROS and WILLIAM P. LACY, Plaintiffs,

vs.

WILLIAM S. RICHARDSON, Lieutenant Governor of Hawaii, Defendant.

COMPLAINT—Filed August 13, 1964

Henrietta Davidson Holt, James Robinson Holt, Carl J. Guntert, Elmer G. Leehman, John J. Medeiros and William P. Lacy, plaintiffs, hereby file their complaint and allege that:

I

The jurisdiction of this Court is based on the Civil Rights Act, 42 USC §§ 1983, 1988. This Court has additional jurisdiction under 28 USC § 1343. Relief hereunder is further sought pursuant to the Federal Declaratory Judgment Act, 28 USC §§ 2201, 2202.

II

As appears more fully below, the plaintiffs herein seek relief consisting of interlocutory or permanent injunctions restraining the enforcement, operation or execution of certain provisions of the Constitution and statutes of the [fol. 4] State of Hawaii by the defendant State officer. Therefore, they are requesting herein the convening of a three judge District Court to grant such relief, as provided under 28 USC §§ 2281 et seq.

III

The individual plaintiffs herein are citizens, taxpayers and electors of the United States and of the State of Hawaii, and as qualified voters in said State, are entitled to vote for members of the senate and the house of representatives of the Hawaii legislature. Said plaintiffs reside in the respective senatorial and representative districts shown below, and are taxpayers and qualified voters thereof:

Plaintiff	Senatorial District	Representative District
Henrietta Davidson Holt	5th	10th
James Robinson Holt	5th	10th
Carl J. Guntert	5th	10th
Elmer G. Leehman	5th	10th
John J. Medeiros	5th	8th
William P. Lacy	4th	15th

The aforementioned plaintiffs jointly and severally bring this action on their own behalf and on behalf of all other persons, citizens, taxpayers and voters in the State of Hawaii who are similarly situated.

IV

The defendant is the duly elected, qualified and acting lieutenant governor of the State of Hawaii and as such is responsible for the supervision of elections, pursuant to § 14-8 and Chapter 11, R.L.H. 1955, as amended, including the receipt of filing of nomination papers for state officers [fol. 5] (§ 11-97, R.L.H. 1955, as amended); issuance of written notices to county clerks, designating the offices to which candidates are to be nominated at the primary election for state and county offices and the time and place at which the primary is to be held in each precinct (§ 11-93, R.L.H. 1955, as amended); transmission to county clerks of certified lists of all persons for whom nomination papers have been duly filed and who are entitled to be voted for, and the office for which each is a candidate (§ 11-98, R.L.H.

1955, as amended) and tabulation of election returns and certification of election (§ 11-70, R.L.H. 1955, as amended).

V

The plaintiffs are denied the right to due process and the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States. They bring this action on their own behalf and on behalf of all citizens, taxpayers and qualified voters of the respective counties of the State of Hawaii, and further on behalf of all voters of said State who are similarly situated, for a declaration of their rights and a declaration of the invalidity of those sections of the Constitution of said State which apportion the election of senators and representatives in said State, and for such declaratory and injunctive relief as may be proper to assure them and all others similarly situated due process and equal protection of the laws which are now and have been for many years denied them by the defendant and his predecessors in office [fol. 6] who have complied with certain provisions of the Constitution of said State, which are violative of the Constitution of the United States, all of which are more particularly set forth hereinafter.

VI

Pursuant to the Admission Act (73 Stat. 4, as amended by 74 Stat. 422) the Constitution of the State of Hawaii as accepted, ratified and confirmed by the United States of America, has adopted the Constitution of the United States as the supreme law of the land, which includes the Fourteenth Amendment, Section 1 of which provides that no state shall deprive any person of life, liberty or property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws.

VII

The Constitution of the State of Hawaii provides for a senate of 25 members, apportioned on the basis of geogra-

phy and not population, and a house of representatives of 51 members, apportioned on the basis of registered voters and not population. These provisions govern the defendant in connection with the performance by him of his official duties relating to the conduct of elections in the State. Defendant has indicated that he will comply with said provisions until he is ordered otherwise by a court of competent jurisdiction.

VIII

Sections 1 to 5 inclusive of Article III of the State Constitution provide for the composition and apportionment of the senate and house of representatives of the State [fol. 7] legislature. Said sections are set forth in Exhibit A, attached hereto and by reference made a part hereof.

A schedule of representative districts and the number of representatives from each is prescribed in Article XVI, Section 1, which is set forth in Exhibit B, attached hereto and by reference made a part hereof.

The house of representatives was apportioned in 1959 in accordance with the provisions of Article III, Section 4, and the present house is so composed. Said apportionment is indicated in the table in part XI hereinafter.

With respect to constitutional amendments affecting representation from any senatorial district, a proviso in Article XV, Section 2, paragraph 6, reads:

> "... provided, that no constitutional amendment altering this proviso or the representation from any senatorial district in the senate shall become effective unless it shall also be approved by a majority of the votes tallied upon the question in each of a majority of the counties."

IX

The apportionment plan covering both the senate and the house of representatives of the State legislature is an integrated apportionment scheme for over-all legislative

representation, and that portion of such plan covering the house of representatives is not severable from that portion covering the senate, and therefore the invalidity of the apportionment of the senate invalidates that of the house of representatives.

[fol. 8] X

The senate is apportioned as provided in Article III, Section 2 of the State Constitution. The population as of the dates indicated in each senatorial district is as follows:

Senatorial District	No. of Senators	1960 Population
1st	5	44,297
2nd	2	17,035
3rd	5	42,855
4th	5	182,307
5th	5	318,102
6th	3	28,176
Totals	25	632,772

The population figures are based on the 1960 Federal Census.

On the basis of the 1960 population data:

The lowest per capita representation is found in the 2nd senatorial district, where one senator represents 8,518 persons. The highest per capita representation is found in the 5th senatorial district, where one senator represents 63,620 persons. The population variance ratio (the number of persons represented by a senator from the 2nd, as compared to the number of persons represented by a senator from the 5th senatorial district) is 1 to 7.44.

The theoretical average number of persons represented by one senator (the quotient of the total population divided by 25) is 25,311.

In the 2nd senatorial district the number of persons represented by one senator is 16,793 *below* said average; in the 5th senatorial district the number of [fol. 9] persons represented by one senator is 38,339 *above* said average.

Districts containing 18% of the population elect a majority of the senate. The 4th and 5th senatorial districts, containing 79% of the State's population, elect 40% of the total number of senators (10 of the 25 senators). The remaining four senatorial districts, containing 21% of the State's population, elect 60% (15 of 25) of the total number of senators.

The 4th senatorial district, in which plaintiff William P. Lacy resides and is registered to vote, now has five senators. If the senate were apportioned on a population basis ($\frac{182,307}{632,772}$ x 25), said district would be entitled to seven senators.

The 5th senatorial district, in which plaintiffs Henrietta Davidson Holt, James Robinson Holt, Carl J. Guntert, Elmer G. Leehman and John J. Medeiros reside and are registered to vote, now has five senators. If the senate were apportioned on a population basis ($\frac{318,102}{632,772}$ x 25), said district would be entitled to 13 senators.

XI

The house of representatives was reapportioned in 1959 as provided in Article III, Section 4, of the State Constitution on the basis of registered voters in the 1958 general election. The apportionment of the house of representatives, the population and the number of registered voters in each representative district, as of the dates indicated, are as follows:

[fol. 10]

Representative District	No. of Rep.	1960 Population	1962 Reg. Voters	1960 Reg. Voters	1958 Reg. Voters
1st	1	5,030	2,319	2,257	2,209
2nd	3	31,553	14,706	14,036	13,836
3rd	1	7,714	3,028	2,973	2,986
4th	1	11,369	4,239	4,073	3,862
5th	1	5,666	2,902	2,720	2,641
6th	1	7,138	2,739	2,574	2,560
7th	4	35,717	15,586	14,965	14,195
8th	4	68,281	22,450	18,369	13,876
9th	2	42,816	7,973	7,410	5,929
10th	4	95,118	20,861	17,003	12,926
11th	3	57,743	14,401	12,553	10,525
12th	3	25,552	10,889	10,000	8,372
13th	2	28,592	7,260	7,807	7,621
14th	4	43,612	17,305	16,056	14,134
15th	6	61,102	28,685	25,869	21,063
16th	4	40,929	17,072	16,176	13,746
17th	4	36,664	17,428	15,880	13,455
18th	3	28,176	11,807	11,338	11,381
Totals	51	632,772	221,650	202,059	175,317

The population figures are based on the 1960 Federal Census; the registered voter figures were obtained from the lieutenant governor.

The lowest per capita representation is found in the 1st representative district, where one representative represents 5,030 persons and 2,319 registered voters (1962).

The highest per capita representation is found in the 10th representative district, where one representative represents 23,764 persons and 5,215 registered voters (1962). The population variance ratio (the number of persons represented by a representative from the 1st representative district as compared to the number of persons represented by a representative from the 10th representative district) is 1 to 4.7.

The 8th representative district, in which plaintiff John J. Medeiros resides and is registered to vote, now has four representatives. If the house were apportioned on a population basis ($\frac{68,281}{632,772} \times 51$), said district would [fol. 11] be entitled to six representatives.

The 10th representative district, in which plaintiffs Henrietta Davidson Holt, James Robinson Holt, Carl J. Guntert and Elmer G. Leehman reside and are registered to vote, now has four representatives. If the house were apportioned on a population basis ($\frac{95,118}{632,772} \times 51$), said district would be entitled to eight representatives.

XII

The provisions of the Constitution of the State of Hawaii, Article III, Sections 2, 3 and 4, and Article XVI, Section 1, violate the Fourteenth Amendment of the Constitution of the United States because the apportionment formula contained therein results, and must necessarily result, when applied to the population figures of said State in a grossly unfair weighting of both houses of the State legislature in favor of the lesser populated areas of the State. There is attached hereto, marked Exhibit "C," a table of the pertinent information as to population and apportionment, which is made a part hereof as if set forth in full.

XIII

The foregoing illustrations of the malapportionment of the senate and the house of representatives of the State [fol. 12] of Hawaii exhibit the gross over-representation of the sparsely populated areas and the gross under-representation of the more populous areas, resulting in the individual plaintiffs' votes and the votes of all other persons similarly situated suffering a debasement and dilution

by virtue of an unconstitutional apportionment of both houses of the legislature, to the denial of said individual plaintiffs and all of those similarly situated of due process of law and equal protection of the laws.

XIV

The provision in Article XV, Section 2, paragraph 6 of the State Constitution, which provides "that no constitutional amendment altering this proviso or the representation from any senatorial district in the senate shall become effective unless it shall also be approved by a majority of the votes tallied upon the question in each of a majority of the counties" is a purposeful, built-in means of perpetuating inequity in senatorial representation, to the denial of rights of plaintiffs and others similarly situated as guaranteed by the Federal Constitution.

XV

The effect of malapportionment of the senate and the house of representatives of the State of Hawaii is to limit the representation of the populous areas and to exaggerate the representation of the sparsely populated areas, to the denial of the rights of plaintiffs and those similarly situated as guaranteed by the Federal Constitution. It is apparent as a result that the plaintiffs and others similarly situated in the said State are governed by a legislature which is not a body representative of the [fol. 13] people of the State and that such control by legislators representing a minority of the people of said State conflicts with the concept of government by consent of the governed and is contrary to the prevailing philosophy of government embodied in the Tenth Amendment of the Constitution of the United States and recognized by all Anglo-Saxon jurisdictions whereby the legislature has power to make laws only because it has the power and the duty to represent the people.

XVI

The defendant unless prevented by this Court must perform the duties as he and his predecessors in office have performed those duties under the challenged constitutional provisions; and the rights of these plaintiffs and the other similarly situated citizens, taxpayers and voters of said State can only be protected by a decree of this Court declaring Article III, Sections 2, 3 and 4, Article XVI, Section 1, and the proviso at the end of the sixth paragraph in Section 2 of Article XV of said State Constitution to be unconstitutional and by enjoining the defendants from performing any acts or duties in compliance with these unconstitutional provisions.

XVII

The plaintiffs have no adequate remedy at law or otherwise. Until such time as the aforesaid provisions of the Constitution of the State of Hawaii have been declared invalid, defendant will be bound thereby and is not free to exercise any discretion to eliminate the deprivation suffered by plaintiffs.

[fol. 14] To amend the Constitution of the State of Hawaii so as to provide for a constitutionally valid apportionment scheme for the election of the members of the senate and the house of representatives of the State legislature by a constitutional convention under Article XV, Section 2 thereof, and under existing law would require an inordinate amount of time, during which plaintiffs would continue to be denied their constitutional rights. The restriction in Article XV, Section 2 of the State Constitution that no amendment altering the representation from any senatorial district shall become effective unless approved by a majority of the votes tallied in each of a majority of the counties, as a practical matter forecloses relief by constitutional amendment.

The Hawaii legislature was called into special session on July 23, 1964, by the Honorable John A. Burns, Governor

of Hawaii, and to date has not adopted a valid reapportionment plan. The Constitution of the State of Hawaii, Article III, Section 11, paragraph 3, provides for special sessions of 30 days, unless extended. The 30th day of the current special session will be August 26, 1964.

The legislature, and in particular the senate, is controlled and dominated by persons elected by a minority of the citizens as hereinabove noted who may be duly expected to preserve the status quo which perpetuates their domination.

Wherefore, the plaintiffs respectfully pray that:

1. This Court take jurisdiction of this matter; that a special three judge court be called to hear and determine this cause as provided by law in 28 USC § 2281 et seq., [fol. 15] and declare the rights of plaintiffs pursuant to 28 USC § 2201 in the premises, to-wit:

(a) That Article III, Sections 2, 3 and 4, Article XVI, Section 1, and the proviso at the end of the sixth paragraph in Section 2 of Article XV, of the Constitution of the State of Hawaii have deprived and continue to deprive the plaintiffs of liberty and property without due process of law and deprive plaintiffs of equal protection of the laws in violation of the Fourteenth Amendment of the Constitution of the United States, and are invalid; and

(b) That the State legislature, pending the adoption of an appropriate constitutional amendment, may provide for apportionment by statute, and that any apportionment law must provide for apportionment of both the senate and house of representatives of the State legislature on the basis of population.

2. Plaintiffs further pray that after hearing this action the Court grant further relief in accordance with 28 USC § 2202 as follows:

(a) (1) To enjoin the defendant from accepting nomination papers of candidates for State legislative

offices, from ordering printing of ballots for State offices and from performing any other duties relating to or affecting nomination and election for State offices, unless the State legislature shall have enacted a statute providing for a valid reapportionment plan to be applied and used in the 1964 election, which election shall be for all seats in the legislature; or

[fol. 16] (2) To require that the defendant conduct the election of 25 senators and 51 representatives for the primary and general elections scheduled for 1964 on an at-large basis, state-wide, without regard to the existing apportionment scheme; or

(3) To provide for conduct of the 1964 elections in accordance with an apportionment plan prepared by the Court in conformity with the decisions of the Supreme Court of the United States;

Provided that, if the Court determines that the 1964 elections are so imminent that effectuation of any reapportionment plan therefor would entail substantial and unreasonable difficulties, the Court may permit the 1964 elections to be held in accordance with existing constitutional provisions, notwithstanding any declaration of invalidity thereof.

(b) If the State legislature now in special session does not enact a valid reapportionment plan and if another special session is called prior to the 1964 elections and no valid reapportionment plan is then enacted, to provide appropriate relief as indicated hereinbelow.

(c) In any event, to retain jurisdiction of the cause to review whatever new apportionment system has been enacted or adopted to meet the requirements of the Fourteenth Amendment to the Constitution of the United States, and for futher hearings herein as to determination of the validity of any such new apportionment system, and in that connection, to permit the plaintiffs to amend the complaint and to pray for appropriate relief.

[fol. 17] (d) Upon failure of enactment of a valid apportionment statute or adoption of a valid amendment of the State Constitution so that the 1966 elections may be conducted in accordance with an apportionment plan that meets the requirements of the Fourteenth Amendment to the Constitution of the United States, to order that the 1966 elections be conducted in accordance with an apportionment plan prepared by the Court.

(e) To provide for such other relief as may be just, equitable and proper.

Dated: Honolulu, Hawaii, this 12th day of August, 1964.

Charles M. Tonaki, Barry J. Rubin, By Charles M. Tonaki, Counsel for Plaintiffs.

Masaji Marumoto, Associate Counsel for Plaintiffs.

[fol. 18] EXHIBIT A TO COMPLAINT

ARTICLE III

The Legislature

SECTION 1. The legislative power of the State shall be vested in a legislature, which shall consist of two houses, a senate and a house of representatives. Such power shall extend to all rightful subjects of legislation not inconsistent with this constitution or the Constitution of the United States.

SECTION 2. The senate shall be composed of twenty-five members, who shall be elected by the qualified voters of the respective senatorial districts. The districts, and the number of senators to be elected from each, shall be as follows:

First senatorial district: that portion of the island of Hawaii known as Puna, Hilo and Hamakua, five;

Second senatorial district: that portion of the island of Hawaii known as Kau, Kona and Kohala, two;

Third senatorial district: the islands of Maui, Molokai, Lanai and Kahoolawe, five;

Fourth senatorial district: that portion of the island of Oahu lying east and south of Nuuanu Street and Pali Road and the upper ridge of the Koolau Range from the Nuuanu Pali to Makapuu Point and all other islands not specifically enumerated, five;

Fifth senatorial district: that portion of the island of Oahu lying west and north of the fourth senatorial district, five; and

Sixth senatorial district: the islands of Kauai and Niihau, three.

SECTION 3. The house of representatives shall be composed of fifty-one members, who shall be elected by the qualified voters of the respective representative districts. Until the next reapportionment, the representative districts and the number of representatives to be elected from each shall be as set forth in the Schedule.

SECTION 4. On or before June 1 of the year 1959, and of each tenth year thereafter, the governor shall reapportion the members of the house of representatives in the following manner: The total number of representatives shall first be reapportioned among four basic areas, namely, (1) the island of Hawaii, (2) the islands of Maui, Molokai, Lanai and Kahoolawe, (3) the island of Oahu [fol. 19] and all other islands not specifically enumerated, and (4) the islands of Kauai and Niihau, on the basis of the number of voters registered at the last preceding general election in each of such basic areas and computed by the method known as the method of equal proportions, no basic area to receive less than one member. Upon the determination of the total number of representatives to which each basic area is entitled, such total shall be reapportioned among the one or more representative districts within each basic area on the basis of the number

of voters registered at the last preceding general election within each of such representative districts and computed by the method known as the method of equal proportions, no representative district to receive less than one member. Upon any reapportionment, should the total number of voters registered in any representative district be less than one-half of the quotient obtained by dividing the total number of voters registered in the State by the total number of members to which the house is entitled, then, as part of such reapportionment, the basic area within which such representative district lies shall be redistricted by the governor in such manner that the total number of voters registered in each new representative district therein shall be more than one-half of such quotient.

The governor shall thereupon issue a proclamation showing the results of such reapportionment, and such reapportionment shall be effective for the election of members to such house for the next five succeeding legislatures.

Original jurisdiction is hereby vested in the supreme court of the State to be exercised on the application of any registered voter, made within thirty days following the date specified above, to compel, by mandamus or otherwise, the governor to perform the above duty; and made within thirty days following the date of such proclamation, to compel, by mandamus or otherwise, the correction of any error made in such reapportionment.

SECTION 5. The members of the legislature shall be elected at general elections. The term of office of members of the house of representatives shall be two years beginning with their election and ending on the day of the next general election, and the term of office of members of the senate shall be four years beginning with their election and ending on the day of the second general election after their election.

[fol. 20] EXHIBIT B TO COMPLAINT

ARTICLE XVI

Schedule

Representative Districts

SECTION 1. As provided in Section 3 of Article III until the next reapportionment, the representative districts and the number of members to be elected from each shall be as follows:

First representative district: that portion of the island of Hawaii known as Puna, one representative;

Second representative district: that portion of the island of Hawaii known as South Hilo, four representatives;

Third representative district: that portion of the island of Hawaii known as North Hilo and Hamakua, one representative;

Fourth representative district: that portion of the island of Hawaii known as Kau and South Kona and that portion of North Kona, for convenience herein referred to as Keauhou, more particularly described as follows: from a point at the seashore between the lands of Holualoa 1 and 2 and Puapuaa 2 running northeasterly along the boundary of Holualoa 1 and 2 to Puu Laalaau; (2) easterly in a straight line to a point called "Naohueleelua" being the common corner of the lands of Puuanahulu, Kaohe and Keauhou 2nd; (3) southeasterly along the common boundary between Hamakua and North Kona districts to the summit of Mauna Loa; (4) westerly along the common boundary between Kau and North Kona districts to the easterly boundary of South Kona district; (5) northerly and westerly along the boundary between North and South Kona districts to the seashore; and (6) northerly along the seashore to the point of beginning, one representative;

Fifth representative district: that portion of the island of Hawaii known as Kohala and that portion of North

Kona not included in the fourth representative district, one representative;

Sixth representative district: the islands of Molokai and Lanai, one representative;

Seventh representative district: the islands of Maui and Kahoolawe, five representatives;

Eighth representative district: that portion of the island of Oahu known as Koolaupoko and Koolauloa, two representatives;

[fol. 21] Ninth representative district: that portion of the island of Oahu known as Waialua and Wahiawa, two representatives;

Tenth representative district: that portion of the island of Oahu known as Ewa and Waianae, two representatives;

Eleventh representative district: that portion of the island of Oahu, for convenience herein referred to as Kalihi, more particularly described as follows: from the intersection of Kalihi and Auiki Streets running westerly along Auiki Street to Mokauea Street; (2) southwesterly along Mokauea Street Extension extended to a point on the outer edge of the reef; (3) westerly along the outer edge of the reef to a point on the Moanalua-Halawa boundary; (4) northerly and northeasterly along the Moanalua-Halawa boundary to the top of Koolau Range; (5) southeasterly along the top of Koolau Range to a place called "Puu Lanihuli"; (6) southwesterly along the top of the ridge between the lands of Kalihi, Kapalama and Nuuanu to Kalihi Street; and (7) southwesterly along Kalihi Street to the point of beginning, three representatives;

Twelfth representative district: that portion of the island of Oahu, for convenience herein referred to as upper Nuuanu, more particularly described as follows: from the intersection of King and Kalihi Streets running northeasterly along Kalihi Street to the ridge between the lands of Kalihi, Kapalama and Nuuanu; (2) northeasterly along

the top of said ridge to a point on the Koolau Range called "Puu Lanihuli"; (3) easterly along the top of said Range to Pali Road at the Nuuanu Pali; (4) southwesterly along Pali Road to Nuuanu Avenue and southwesterly along Nuuanu Avenue to School Street; (5) northwesterly along School Street to the center line of the Kapalama Drainage Canal (Waikiki Branch); (6) southwesterly along said Canal to the center line of the main Kapalama Drainage Canal; (7) southwesterly along said Canal to King Street; and (8) northwesterly along King Street to the point of beginning, three representatives;

Thirteenth representative district: that portion of the island of Oahu, for convenience herein referred to as Kapalama, more particularly described as follows: from the junction of the Honolulu Harbor Channel and the reef running westerly along the outer edge of the reef to Mokauea Street Extension extended, (2) northeasterly along Mokauea Street Extension extended to Sand Island Road; (3) northeasterly along Mokauea Street Extension to Auiki Street; (4) easterly along Auiki Street to Kalihi Street; (5) northeasterly along Kalihi Street to King Street; (6) southeasterly along King Street to the center line of the main Kapalama Drainage Canal; (7) northerly along said Canal to the center line of the Kapalama Drainage Canal (Waikiki Branch); (8) northeasterly along said Canal to School Street; (9) southeasterly along School Street to Nuuanu Avenue; (10) southwesterly along Nuuanu Avenue to the sea, and (11) southwesterly along the middle of Honolulu Harbor and Honolulu Harbor Channel to the point of beginning, three representatives;

[fol. 22] Fourteenth representative district: that portion of the island of Oahu, for convenience herein referred to as Pauoa, more particularly described as follows: from the junction of the Honolulu Harbor Channel and the outer edge of the reef running northeasterly along the middle of Honolulu Harbor Channel and Honolulu Harbor to the

intersection of Queen Street and Nuuanu Avenue; (2) northeasterly along Nuuanu Avenue to Pali Road and northeasterly along Pali Road to the top of the Koolau Range at the Nuuanu Pali; (3) easterly and southerly along the top of the Koolau Range to a point called "Puu Konahuanui"; (4) southwesterly along the top of the ridge between the lands of Nuuanu, Pauoa and Manoa to a mountain peak called "Puu Ohia" or "Tantalus"; (5) southwesterly along the top of the ridge between the lands of Makiki and Kalawahine to the intersection of Nehoa Street and Lewalani Drive; (6) southerly along Lewalani Drive and Piikoi Street to Wilder Avenue; (7) easterly along Wilder Avenue to Punahou Street; (8) southerly along Punahou Street to King Street; (9) westerly along King Street to Kalakaua Avenue; (10) southerly along Kalakaua Avenue to the center line of the Ala Wai Canal; (11) westerly along said Canal and along the line of said Canal extended to the outer edge of the reef; and (12) westerly along the outer edge of the reef to the point of beginning, five representatives;

Fifteenth representative district: that portion of the island of Oahu, for convenience herein referred to as Manoa and Waikiki, more particularly described as follows: from the intersection of Kalakaua Avenue and the center line of the Ala Wai Canal running northerly along Kalakaua Avenue to King Street; (2) easterly along King Street to Punahou Street; (3) northerly along Punahou Street to Wilder Avenue; (4) westerly along Wilder Avenue to Piikoi Street; (5) northerly along Piikoi Street to Lewalani Drive; (6) northerly along Lewalani Drive to Nehoa Street; (7) northeasterly along the top of the ridge between the lands of Makiki and Kalawahine to a mountain peak called "Puu Ohia" or "Tantalus"; (8) northeasterly along the top of the ridge between the lands of Pauoa, Manoa and Nuuanu to a point on the Koolau Range called "Puu Konahuanui"; (9) southeasterly along the top of said Range to a place called "Mt. Olympus"; (10) southwesterly along the top of Waahila Ridge to the top edge of Palolo Valley; (11) south-

westerly along the top edge of said Valley to the forest reserve boundary; (12) southwesterly along the southeasterly boundary of St. Louis Heights Tract, Series 2 (File Plan 464) to the southerly boundary of said Tract 100 feet southeasterly from Alencastre Street; (13) southwesterly parallel to and 100 feet from Alencastre Street and St. Louis Drive to Waialae Avenue; (14) westerly along Waialae Avenue to Kapahulu Avenue extended; (15) southerly across Waialae Avenue and along Kapahulu Avenue to Kalakaua Avenue; (16) westerly along Kapahulu Avenue extended to the outer edge of the reef; (17) northwesterly along the outer edge of the reef to a point on the line extended of the center line of the Ala Wai Canal; and (18) easterly along said line to the point of beginning, six representatives;

[fol. 23] Sixteenth representative district: that portion of the island of Oahu, for convenience herein referred to as Kaimuki and Kapahulu, more particularly described as follows: from a point at the seacoast at a place called "Black Point" running westerly along the seacoast to Kapahulu Avenue extended to the sea; (2) easterly across Kalakaua Avenue and easterly and northerly along Kapahulu Avenue to Waialae Avenue; (3) easterly along Waialae Avenue to a point 100 feet easterly of St. Louis Drive; (4) northeasterly across Waialae Avenue then parallel to and 100 feet from St. Louis Drive and Alencastre Street to the southerly boundary of St. Louis Heights Tract, Series 2 (File Plan No. 464); (5) northeasterly along the southeasterly boundary of said Tract to the forest reserve boundary; (6) northeasterly along the top ridge of Palolo Valley to the top of Waahila Ridge; (7) northeasterly along the top of Waahila Ridge to a point on Koolau Range called "Mt. Olympus"; (8) easterly along the top of the Koolau Range to the top of the ridge between the lands of Waialae Nui and Palolo; (9) southwesterly along the top of said ridge to a place called "Kalepeamoa"; (10) southwesterly along Mauumae Ridge to Sierra Drive; (11) southwesterly

along Sierra Drive to Waialae Avenue; (12) easterly along Waialae Avenue to 13th Avenue; (13) southwesterly along 13th Avenue and Ocean View Drive to Kilauea Avenue; (14) westerly along Kilauea Avenue to Makapuu Avenue; (15) southwesterly along Makapuu Avenue to Diamond Head Road; and (16) southeasterly along Diamond Head Road to the Military Road and along the Military Road extended to the point of beginning, four representatives;

Seventeenth representative district: that portion of the island of Oahu not included in any other representative district on the island of Oahu, together with all other islands not included in any other representative district, three representatives;

Eighteenth representative district: the islands of Kauai and Niihau, four representatives.

Wherever a roadway, or the intersection of one or more roadways, is designated as a boundary in any of the above descriptions, the center line of such roadway or intersection is intended as such boundary.

[fol. 24]

EXHIBIT C TO COMPLAINT

(See opposite) ☞

[fol. 24]

EXHIBIT C TO COMPLAINT

Area and District	1960 Population*	1960 Reg. Voters**	1962 Reg. Voters**	Present No. of Legislators	Reapportionment By Method of Equal Proportions Based on: Population 1960	Reg. Voters 1960	Reg. Voters 1962
State of Hawaii	632,772	202,059	221,650	76	76	76	76
THE SENATE							
First - Hawaii	44,297	19,266	20,053	5	1	2	2
Second - Hawaii	17,035	6,793	7,141	2	1	1	1
Third - Maui	42,855	17,539	18,325	5	2	2	2
Fourth - Oahu	182,307	73,981	80,490	5	7	9	9
Fifth - Oahu	318,102	73,142	83,834	5	13	9	10
Sixth - Kauai	28,176	11,338	11,807	3	1	2	1
THE HOUSE							
First - Hawaii	5,030	2,257	2,319	1	1	1	1
Second - Hawaii	31,553	14,036	14,706	3	1	3	2
Third - Hawaii	7,714	2,973	3,028	1	1	1	1
Fourth - Hawaii	11,369	4,073	4,239	1	1	1	1
Fifth - Hawaii	5,666	2,720	2,902	1	1	1	1
Sixth - Maui	7,138	2,574	2,739	1	1	1	1
Seventh - Maui	35,717	14,965	15,586	4	3	3	3
Eighth - Oahu	68,281	18,369	22,450	4	6	5	5
Ninth - Oahu	42,816	7,410	7,973	2	3	2	2
Tenth - Oahu	95,118	17,003	20,861	4	7	4	5
Eleventh - Oahu	57,743	12,553	14,401	3	5	3	3
Twelfth - Oahu	25,552	10,000	10,889	3	2	3	3
Thirteenth - Oahu	28,592	7,807	7,260	2	2	2	2
Fourteenth - Oahu	43,612	16,056	17,305	4	4	4	3
Fifteenth - Oahu	61,102	25,869	28,685	6	5	6	7
Sixteenth - Oahu	40,929	16,176	17,072	4	3	4	4
Seventeenth - Oahu	36,664	15,880	17,428	4	3	4	4
Eighteenth - Kauai	28,176	11,338	11,807	3	2	3	3

Source: Department of Planning and Economic Development, State of Hawaii, July 28, 1964.
*Based on 1960 Federal Census.
**From Office of the Lieutenant Governor, State of Hawaii. Instances when apportionment based on registered voters differs from that based on population are indicated by underscoring.

[fol. 25]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

Civil No. 2308

[Title omitted]

SUMMONS—Filed August 13, 1964

To the above named Defendant:

You are hereby summoned and required to serve upon Charles M. Tonaki and Masaji Marumoto, plaintiffs' attorneys, whose addresses are 1201 First National Bank Building, Honolulu, Hawaii, 96813, and 235 Queen Street, Honolulu, Hawaii, 96813, respectively, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Wm. F. Thompson, Jr., Clerk of Court.

E. C. Robinson, Deputy Clerk.

Date: August 13, 1964

[Seal of Court]

(Note: This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.)

[fol. 26]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

Civil No. 2308

[Title omitted]

MOTION FOR PRELIMINARY INJUNCTION—
Filed August 13, 1964

Upon the complaint and the affidavit of Carl J. Guntert annexed hereto, plaintiffs move the Court as follows:

1. To issue a preliminary injunction enjoining the defendant from accepting nomination papers of candidates for State legislative offices, from ordering the printing of ballots for State offices, and from performing any other duties affecting nomination and election for State offices at the 1964 elections.

The grounds of this motion, as more fully set forth in the complaint and the annexed affidavit of Carl J. Guntert, are that:

(a) the existing provisions of the Hawaii State Constitution pertaining to the apportionment of seats in the Senate and the House of Representatives of the Hawaii Legislature are invalid and contrary to the [fol. 27] equal protection clause of the Fourteenth Amendent to the United States Constitution;

(b) defendant Lieutenant Governor is the duly elected, qualified and acting Lieutenant Governor of the State of Hawaii and as such is responsible for the conduct of elections in the State, pursuant to Chapter 11, Revised Laws of Hawaii 1955, as amended;

(c) the State primary election will be held on October 3, 1964, and general election will be held on November 3, 1964. The deadline for filing nomination papers is September 3, 1964;

(d) unless defendant be immediately enjoined, said defendant will cause said elections to be held in accordance with the existing provisions of the State Constitution. Unless said defendant be enjoined pending a final disposition of this action, injury to plaintiffs in the interim will be irreparable even before final judgment for plaintiffs;

(e) no injury will be sustained by the defendant or by the public through issuance of a preliminary injunction.

[fol. 28] 2. To convene for the purpose of hearing and determining this application for a preliminary injunction and for this cause a statutory court of three judges, at least one of whom shall be a circuit judge, in accordance with the provisions of Section 2284, Title 28, United States Code.

Dated: Honolulu, Hawaii, August 12th, 1964.

Charles M. Tonaki, Attorney for Plaintiffs.

[fol. 29]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

Civil No. 2308

[Title omitted]

ATTACHMENT TO MOTION

AFFIDAVIT OF CARL J. GUNTERT—Filed August 13, 1964

State of Hawaii,
City and County of Honolulu, ss.:

Carl J. Guntert, being first duly sworn, on his own behalf and on behalf of the other plaintiffs herein, on oath, deposes and says:

1. That he is one of the plaintiffs in the above entitled action, and has read the complaint herein, and is cognizant of the facts alleged therein, and that to his knowledge, the facts and matters stated and set forth therein are true and correct;

2. That defendant William S. Richardson is the duly elected, qualified and acting Lieutenant Governor of the State of Hawaii and as such is responsible for the conduct of elections in the State, pursuant to Chapter 11, Revised Laws of Hawaii 1955, as amended;

[fol. 30] 3. That said defendant William S. Richardson will accept nomination papers from candidates for State legislative officers, order printing of ballots for State offices, and will perform other duties affecting nomination and election for State offices prior to and for the primary election on October 3 and the general election on November 3, 1964;

4. That the conduct of said primary and general elections will continue the unconstitutional apportionment of seats in the Legislature of the State of Hawaii, which will continue to deprive your affiant of his rights under the equal protection clause of the Fourteenth Amendment to the United States Constitution;

5. That at said elections various candidates for the offices of State senator of the State of Hawaii will be nominated and elected; that said senators will hold office until 1968;

6. That if said elections are permitted to be conducted, the invidious discrimination resulting from the illegal apportionment of seats in the Legislature of the State of Hawaii (as more fully set out in the complaint) will be continued and perpetuated for at least until 1968;

7. That said perpetuation and continuation of the illegally apportioned Legislature of the State of Hawaii denies your affiant and others similarly situated of their rights under the equal protection clause of the Fourteenth Amend-

[fol. 31] ment to the United States Constitution and causes your affiant irreparable injury.

Further affiant sayeth not.

Carl J. Guntert

Subscribed and sworn to before me this 12th day of August, 1964.

(SEAL)

Helen M. Mau, Notary Public, First Circuit, State of Hawaii.

My Commission Expires: 2/15/65.

[fol. 32]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

Civil No. 2308

[Title omitted]

MEMORANDUM OF AUTHORITIES—Filed August 13, 1964

This action is brought under the provisions of the Civil Rights Act, 42 U.S.C. §§ 1983-1988, as well as under 28 U.S.C. § 1343. The authority of this Court to grant an injunction is provided specifically in 28 U.S.C. § 2281 which permits the enjoining of a State officer from the execution of a State statute on the ground of the unconstitutionality of such statute. There is a requirement that the matter be heard and determined by a District Court of three (3) judges, pursuant to 28 U.S.C. § 2284. Specific authority to grant an interlocutory injunction is provided in § 2284.

The fact that plaintiffs request the restraint of a state officer from acting pursuant to a provision of the Constitution of Hawaii does not exclude it from the provisions of

§ 2281, which refers only to a State statute. *Sincock* v. *Duffy,* 215 F. Supp. 169, affirmed in *Roman et al.* v. *Sincock, et al.,* —— U.S. ——, 32 L.W. 4583.

[fol. 33] Enjoining a State election official from conducting an unconstitutional election is a proper subject matter for this Court to entertain, pursuant to §§ 2281 and 2284. The right to enjoin a State election official from conducting elections pursuant to an unconstitutional apportionment scheme was established in *Reynolds, et al.* v. *Sims, et al.,* —— U.S. ——, 32 L.W. 4535.

Section 2284 authorizes this Court to hear, determine and grant interlocutory injunctions as necessary to prevent irreparable injury pending a full determination of the matter. Interlocutory orders were issued in *Mann* v. *Davis,* 213 F. Supp. 577 (1962), affirmed in *Davis* v. *Mann,* —— U.S. ——, 32 L.W. 4579, and by the District Court in *Reynolds* v. *Sims, supra.* In both of these cases, the injunctions were issued prior to a final hearing in order to preserve the rights of the plaintiff pending final determination of the cause. In both cases, the Court issued injunctive orders relating to the conduct of State elections for legislative seats.

Dated at Honolulu, Hawaii, August 12, 1964.

Charles M. Tonaki, Attorney for Plaintiffs.

[fol. 51] [File endorsement omitted]

[fol. 52]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

Civil No. 2308

HENRIETTA DAVIDSON HOLT, JAMES ROBINSON HOLT, CARL J. GUNTERT, ELMER G. LEEHMAN, JOHN J. MEDEIROS and WILLIAM P. LACY, Plaintiffs,

vs.

WILLIAM S. RICHARDSON, Lieutenant Governor of Hawaii, Defendant,

JOHN J. HULTEN and GEORGE M. OKANO, Members of the Legislature of the State of Hawaii, Applicants for Intervention.

ANSWER OF DEFENDANT—Filed August 21, 1964

William S. Richardson, Lieutenant Governor of Hawaii, defendant above named, for answer to the complaint herein, states as follows:

I

Defendant admits the jurisdiction of this Court as stated in paragraph I.

II

Defendant admits that the relief sought by the complaint requires the convening of a three judge District Court as provided under 28 U.S.C. § 2281 et seq., as requested by paragraph II.

III

Defendant admits the allegations of paragraph III.

[fol. 53] IV

Defendant admits the allegations of paragraph IV.

V

Defendant denies that the sections of the Constitution of the State of Hawaii which apportion the members of the house of representatives of the legislature of the State of Hawaii are invalid, as alleged in paragraph V, but admits that, under recent decisions of the Supreme Court of the United States, the sections of the Constitution of the State of Hawaii which apportion the members of the senate of the legislature of the State of Hawaii may be invalid and leaves plaintiffs to their proof thereof.

Defendant admits that he and his predecessors in office have complied with provisions of the Constitution of the State of Hawaii, alleged in paragraph V to be invalid.

VI

Defendant admits the allegations of paragraph VI.

VII

Defendant admits the allegations of paragraph VII.

VIII

Defendant admits the allegations of paragraph VIII.

Defendant further states that the number of representatives from each representative district, as set forth in Ex-
[fol. 54] hibit B was as a result of an apportionment based upon the number of registered voters in each of such districts in the general election in Hawaii in 1948.

Defendant further states that the number of representatives from each representative district, as set forth in the table in paragraph XI of the complaint, was as a result of an apportionment based upon the number of registered voters in each of such districts in the general election in Hawaii in 1958.

IX

Defendant admits that the apportionment plan covering both the senate and the house of representatives is an integrated apportionment scheme for over-all legislative representation, but alleges that the portion of the plan covering the house of representatives is severable from that portion of the plan covering the senate and denies that any invalidity of the apportionment of the senate invalidates the apportionment of the house of representatives, as alleged in paragraph IX.

X

Defendant admits the allegations contained in paragraph X, but denies that an apportionment of the members of the senate is required by law to be based upon total population.

XI

Defendant admits the allegations contained in paragraph XI, but denies that an apportionment of the members of the house of representatives is required by any law to be based upon total population.

[fol. 55] Defendant further states that comparisons made in said paragraph XI to the number of registered voters per representative, based upon 1962 registered voters, is misleading for the reason that the current apportionment of the house of representatives is based upon the number of voters registered for the general election in 1958, and is not required by any law to be revised earlier than in the

year 1969, based upon the number of voters registered for the generai election in 1968.

Defendant further states that there was a total of 175,317 voters registered in all representative districts for the general election in 1958. With a house of 51 members, the theoretical number of voters that each member should represent was 3,437 (175,317 ÷ 51). This fact would indicate a range of from 1719 voters to 5155 voters for each representative district because a district having one more than half of the theoretical number of registered voters would be entitled to one representative and a district would not be entitled to a second representative until the registered voter population of the district exceeded the theoretical number by one more than the theoretical number plus one half of such number.

Defendant alleges that each one of the eighteen representative districts falls well within that range.

The representative elected from the first representative district, the district having the least registered voters in 1958, represented 2,209 registered voters, 490 more than the minimum theoretically required for one representative.

[fol. 56] The six representatives elected from the fifteenth representative district, the district having the most registered voters in 1958, (21,063) each represented 3,510 registered voters, 73 more than the theoretical number each representative should represent.

The three representatives elected from the second representative district, the district having the highest ratio of registered voters to representatives, each represented 4,609 registered voters, 546 less than the maximum theoretically required for one representative.

All other representative similarly represent a number of registered voters within the permissible extremes, as shown by the following table:

Representative District	1958 Registered Voters	No. of House Members	Ratio of Members to Voters
1	2,209	1	1-2,209
2	13,836	3	1-4,609
3	2,986	1	1-2,986
4	3,862	1	1-3,862
5	2,641	1	1-2,641
6	2,560	1	1-2,560
7	14,195	4	1-3,548
8	13,876	4	1-3,469
9	5,929	2	1-2,964
10	12,926	4	1-3,231
11	10,525	3	1-3,508
12	8,372	3	1-2,791
13	7,621	2	1-3,810
14	14,134	4	1-3,533
15	21,063	6	1-3,510
16	13,746	4	1-3,436
17	13,455	4	1-3,364
18	11,381	3	1-3,797

XII

Defendant denies that the provisions of Article III, Sections 2, 3 and 4 and Article XVI Section 1 of the Constitution of the State of Hawaii violate the Fourteenth Amend-
[fol. 57] ment, but leaves plaintiffs to their proof thereof.

Defendant further states that no law requires the apportionment of either house of the legislature to be based on total population.

XIII

Defendant denies the allegations of paragraph XIII.

XIV

Defendant denies the allegations of paragraph XIV.

Defendant denies the allegations of paragraph XV.

XVI

Defendant admits that he must perform his statutory duties with respect to the constitutional provisions challenged by the complaint, but denies that plaintiffs require the protection of this court by the entry of a decree declaring Article III Sections 2, 3 and 4, Article XVI Section 1, and the proviso at the end of the sixth paragraph of Section 2 of Article XV of the said State Constitution to be unconstitutional and denies that under equitable principles he should be enjoined from performing such statutory duties.

Defendant further states that the election process as prescribed by law for the 1964 elections of senators and representatives is now in progress and that to attempt to change such process at this time by judicial decree would be contrary to the best interests of the public and under just and equitable considerations should not be interferred with at this time.

[fol. 58] XVII

Defendant admits the allegations of the first paragraph of paragraph XVII.

Defendant admits that the process for amending the Constitution of the State takes time as alleged in paragraph XVII but denies that the amount of time is inordinate under equitable principles.

Defendant denies that the restriction in Article XV, Section 2 of the State Constitution on amending the apportionment of the senate forecloses relief by constitutional amendment, as alleged in paragraph XVII, for the reason that said restriction can itself be amended.

Defendant admits the allegations contained in the third paragraph of paragraph XVII and denies the allegations contained in the fourth paragraph of paragraph XVII.

XVIII

For further answer to the complaint, defendant denies that this Court has power to determine that the state legislature, pending the adoption of appropriate constitutional amendments, may provide for apportionment of either house of the legislature by statute (as prayed for), all matters involving the apportionment of either house having been expressly reserved to the people by the State Constitution.

XIX

For further answer to the complaint, defendant alleges that should this Court interfere with the impending 1964 elections of senators and representatives by directing all such elections to be on an at-large basis, the result would deprive virtually all of the voters in areas other than the Island of Oahu of representation in the legislature and [fol. 59] would in fact be more inequitable and violative of the Fourteenth Amendment of the Constitution of the United States than may now result from the present apportionment of the legislature.

Wherefore defendant prays that:

1. This Court determine the validity of Article III, Sections 2, 3 and 4, Article XVI, Section 1, and the proviso at the end of the sixth paragraph of Section 2 of Article XV of the Constitution of the State of Hawaii.

2. This Court refuse to enjoin the defendant from performing his statutory duties with respect to the 1964 elections of senators and representatives of the legislature of the State of Hawaii.

3. This Court refuse to interfere with the conduct of said elections, by requiring such elections to be conducted on an at-large basis or by interfering therewith in any other way.

4. This Court, in the event the aforesaid provisions of the Constitution of the State of Hawaii, or any of them,

are determined to be invalid, abstain from directing any change in said provisions, or in the present apportionment of the legislature of the State of Hawaii, until the people of Hawaii have had a reasonable opportunity to amend the provisions determined to be invalid in the manner established by said Constitution.

5. This Court grant such other and further relief as it may deem meet and proper.

Dated: Honolulu, Hawaii, this 21st day of August, 1964.

R. G. Dodge, 602 Trustee Building, Honolulu, Hawaii, Attorney for Defendant.

[fol. 60] [File endorsement omitted]

[fol. 64]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

Civil No. 2308

HENRIETTA DAVIDSON HOLT, JAMES ROBINSON HOLT, CARL J. GUNTERT, ELMER G. LEEHMAN, JOHN J. MEDEIROS and WILLIAM P. LACY, Plaintiffs,

vs.

WILLIAM S. RICHARDSON, Lieutenant Governor of Hawaii, Defendant,

JOHN A. BURNS, Governor of Hawaii, Applicant for Intervention.

COMPLAINT IN INTERVENTION OF JOHN A. BURNS—Filed August 24, 1964

John A. Burns, intervenor, hereby files his complaint and alleges that:

I

The jurisdiction of this Court is based on the Civil Rights Act, 42 USC §§ 1983, 1988. This Court has additional jurisdiction under 28 USC § 1343. Relief hereunder is further sought pursuant to the Federal Declaratory Judgment Act, 28 USC §§ 2201, 2202.

II

Intervenor is a citizen, taxpayer and elector of the United States and of the State of Hawaii, a qualified voter in the 5th senatorial district and the 8th representative dis- [fol. 65] trict of the State of Hawaii, and is the duly elected, qualified and acting Governor of the State of Hawaii.

III

Intervenor makes the same allegations as plaintiffs with respect to the unconstitutionality of the provisions of the Hawaii Constitution governing composition and apportionment of the Hawaii Legislature, and the resultant dilution and debasement of his vote and denial of his right to equal protection under the 14th Amendment to the Constitution of the United States. Accordingly, he adopts paragraph II and paragraphs IV through XVII of plaintiffs' complaint, and incorporates the same herein by reference.

IV

The issue of unconstitutional apportionment of the State Legislature involves a matter *publici juris*. Intervenor, as governor, is the chief executive officer of the State, and as such is representative of all of the people of the State of Hawaii, and their rights and interests, including their right to have their State apportioned in accordance with the provisions of the Constitution of the United States and to be governed by a legislature which fairly represents the whole body of the electorate, in accordance with the

Constitution of the United States. By his oath of office, prescribed in Article XIV, Section 4 of the Hawaii Constitution, he is sworn to support and defend the Constitution of the United States. Accordingly he claims a right to, [fol. 66] and seeks (a) an apportionment of the State Legislature that is in conformity with the provisions of the Constitution of the United States, and (b) a declaration with respect to the validity of the provisions of the Constitution of the State of Hawaii affecting the composition and apportionment of the State Legislature.

As governor he is responsible, among other things, for the calling of special sessions of the State Legislature (Hawaii Constitution, Article III, Sec. 11), for extension of any session of the Legislature (*Ibid.*), for reapportionment of the State House of Representatives (*Id.*, Article III, Sec. 4), for approval or veto of legislation (*Id.*, Article III, Sec. 17) and for proclamation of general elections at least 40 days before such election (Section 11-1, Revised Laws of Hawaii 1955, as amended). With relation to the proper performance of such duties, he will be directly affected by and thus has a direct interest in the judgment in this action.

Wherefore, the intervenor respectfully prays that:

1. This Court take jurisdiction of this matter; that a special three judge court be called to hear and determine this cause as provided by law in 28 USC § 2281 et seq., and declare the rights of intervenor pursuant to 28 USC § 2201 in the premises, to-wit:

(a) That Article III, Sections 2, 3 and 4, Article XVI, Section 1, and the proviso at the end of the sixth paragraph in Section 2 of Article XV, of the Constitution of the State of Hawaii have deprived and continue to deprive [fol. 67] the intervenor of equal protection of the laws in violation of the 14th Amendment of the Constitution of the United States, and are invalid; and

(b) That the State Legislature, pending the adoption of an appropriate constitutional amendment, may provide

for apportionment by statute, and that any apportionment law must provide for apportionment of both the senate and house of representatives of the State Legislature on the basis of population.

2. Intervenor further prays that after hearing this action the Court grant further relief in accordance with 28 USC § 2202 as follows:

(a) If the State Legislature now in special session does not enact a valid reapportionment plan that is applicable to the 1964 elections and/or if another special session is called prior to the 1964 elections and no such reapportionment plan is then enacted:

(1) To enjoin the defendant from accepting nomination papers of candidates for State legislative offices, from ordering printing of ballots for State offices and from performing any other duties relating to or affecting nomination and election for State offices in accordance with those provisions of the State Constitution affecting composition and apportionment of the Legislature, and

a. To require that the defendant conduct the election of 25 senators and 51 representatives for the primary and general elections scheduled for 1964 on [fol. 68] an at-large basis, state-wide, without regard to the existing apportionment scheme; or

b. To provide for conduct of the 1964 elections in accordance with an apportionment plan prepared by the Court in conformity with the decisions of the Supreme Court of the United States;

Provided that, if the Court determines that the 1964 elections are so imminent that effectuation of any reapportionment plan therefor would entail substantial and unreasonable difficulties, the Court may permit the 1964 elections to be held in accordance

with existing constitutional provisions, notwithstanding any declaration of invalidity thereof.

(b) In any event, to retain jurisdiction of the cause to review whatever new apportionment system has been enacted or adopted to meet the requirements of the 14th Amendment to the Constitution of the United States, and for further hearings herein as to determination of the validity of any such new apportionment system, and in that connection, to permit the intervenor to amend his complaint and to pray for appropriate relief.

(c) Upon failure of enactment of a valid apportionment statute or adoption of a valid amendment of the State Constitution so that the 1966 elections may be conducted in accordance with an apportionment plan that meets the requirements of the 14th Amendment to the Constitution of the United States, to order that the 1966 elections be [fol. 69] conducted in accordance with an apportionment plan prepared by the Court.

(d) To provide for such other relief as may be just, equitable and proper.

Dated: Honolulu, Hawaii, this 22nd day of August, 1964.

Bert T. Kobayashi, Attorney General, State of Hawaii, Bertram T. Kanbara, Nobuki Kamida, Peter A. Donahoe, Deputy Attorneys General, By Bertram T. Kanbara, Counsel for Applicant for Intervention.

[fol. 75] [File endorsement omitted]

[fol. 76]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

Civil No. 2308

HENRIETTA DAVIDSON HOLT, JAMES ROBINSON HOLT, CARL J. GUNTERT, ELMER G. LEEHMAN, JOHN J. MEDEIROS and WILLIAM P. LACY, Plaintiffs,

vs.

WILLIAM S. RICHARDSON, Lieutenant Governor of Hawaii, Defendant,

JOHN J. HULTEN and GEORGE M. OKANO, Members of the Legislature of the State of Hawaii, Applicants for Intervention as Plaintiffs,

NELSON K. DOI, KAZUHISA ABE, TOSHI ANSAI, FRANCIS M. F. CHING, WILLIAM H. HILL, BERNARD G. KINNEY, BENJAMIN MENOR, NOBORU MIYAKE, THOMAS S. OGATA, CLINTON I. SHIRAISHI, DAVID K. TRASK, JR., JOHN T. USHIJIMA, JULIAN R. YATES, SR., Applicants for Intervention as Defendants.

APPLICATION TO FIX TIME FOR HEARING AND ORDER THEREON —Filed August 24, 1964

The above applicants to intervene as defendants request the Court fix 2:00 p.m., Monday, August 24, 1964, as the time for hearing their application upon the ground that another such application is to be then heard and that if their application is granted, their interests require their repre-

[fol. 77] sentation at the hearing on the preliminary injunction.

Dated: Honolulu, Hawaii, August 21, 1964.

Frank D. Padgett, 312 Castle & Cooke Building, Honolulu, Hawaii, Attorney for said Applicants.

Robertson, Castle & Anthony, Of Counsel.

It Is So Ordered:

Martin Pence, District Judge.

[fol. 78]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

[Title omitted]

MOTION OF NELSON K. DOI, ET AL. TO INTERVENE AS DEFENDANTS—Filed August 24, 1964

The above-named applicants for intervention as defendants move, pursuant to Rule 24(a) of the Federal Rules of Civil Procedure, for leave to intervene as defendants in this action in order to answer the complaint, a copy of [fol. 79] which answer is attached, on the ground that the representation of the defendant, the Lieutenant Governor of Hawaii, is or may not be adequate and that the applicants are or may be bound by the judgment in this action.

Dated: Honolulu, Hawaii, August 21, 1964.

Frank D. Padgett, 312 Castle & Cooke Building, Honolulu, Hawaii, Attorney for said Applicants.

Robertson, Castle & Anthony, Of Counsel.

[fol. 80]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

Civil No. 2308

NOTICE OF MOTION TO INTERVENE—Filed August 24, 1964

To:

Charles M. Tonaki, Esq., Barry J. Rubin, Esq., 1201 First National Bank Building, Honolulu, Hawaii, Counsel for Plaintiffs.

Masaji Marumoto, Esq., 235 Queen Street, Honolulu, Hawaii, Associate Counsel for Plaintiffs.

William S. Richardson, Lieutenant Governor, State of Hawaii, Iolani Palace, Honolulu, Hawaii, Defendant.

Bert T. Kobayashi, Attorney General, State of Hawaii.

Please Take Notice that the undersigned will bring the foregoing motion to intervene on for hearing before the presiding judge of this Court, the Honorable Martin Pence, on the 24th day of August, 1964, at 2:00 p.m., or as soon thereafter as counsel can be heard.

Dated: Honolulu, Hawaii, August 21, 1964.

Frank D. Padgett, Attorney for said Applicants.

[fol. 81] [File endorsement omitted]

[fol. 82]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

Civil No. 2308

HENRIETTA DAVIDSON HOLT, JAMES ROBINSON HOLT, CARL J. GUNTERT, ELMER G. LEEHMAN, JOHN J. MEDEIROS and WILLIAM P. LACY, Plaintiffs,

vs.

WILLIAM S. RICHARDSON, Lieutenant Governor of Hawaii, Defendant,

JOHN J. HULTEN and GEORGE M. OKANO, Members of the Legislature of the State of Hawaii, Intervenors Plaintiffs,

NELSON K. DOI, KAZUHISA ABE, TOSHI ANSAI, FRANCIS M. F. CHING, WILLIAM H. HILL, BERNARD G. KINNEY, BENJAMIN MENOR, NOBORU MIYAKE, THOMAS S. OGATA, CLINTON I. SHIRAISHI, DAVID K. TRASK, JR., JOHN T. USHIJIMA, JULIAN R. YATES, SR., Intervenors Defendants.

ANSWER AND CROSS-CLAIM OF NELSON K. DOI, ET AL.
—Filed August 24, 1964

Come now the above-named intervenors defendants and allege that they are taxpayers and registered voters of the State of Hawaii and duly elected members of the Senate of the State of Hawaii and that their names and the Senate and Representative Districts where they reside are as follows:

[fol. 83]

Senator	*Senate District*	*Representative District*
Nelson K. Doi	1	2
Kazuhisa Abe	1	2
Toshi Ansai	3	7
Francis M. F. Ching	6	18
William H. Hill	1	2
Bernard G. Kinney	2	5
Benjamin Menor	1	2
Noboru Miyake	6	18
Thomas S. Ogata	3	7
Clinton I. Shiraishi	6	18
David K. Trask, Jr.	3	7
John T. Ushijima	1	2
Julian R. Yates, Sr.	2	4

[fol. 84] ANSWER

1. They admit that plaintiffs claim to base their action upon the statutory Section cited in paragraph I of the complaint. They deny that there is any real case or controversy between plaintiffs and defendant.

2. They admit the allegations of paragraph II.

3. They lack sufficient information to admit the allegations of paragraph III, and they, therefore, deny them.

4. They admit the allegations of paragraph IV.

5. They deny the allegations of paragraph V.

6. They admit the allegations of paragraphs VI, VII and VIII.

7. They deny the allegations of paragraph IX.

8. They admit the allegations of the first sentence of paragraph X, and for lack of sufficient information, deny the remainder.

9. They admit the allegations of the first sentence of paragraph XI, and for lack of sufficient information, deny the remaining allegations of said paragraph.

10. They deny the allegations of paragraphs XII, XIII, XIV, XV, XVI and XVII, save and except the allegations of the second paragraph thereof on page 12, which same are admitted.

[fol. 85] 11. The Senate of the State of Hawaii by the passage of numerous legislative measures has evidenced good faith in attempting to achieve a legislative apportionment beyond constitutional criticism and will continue to do so, and there is neither need nor occasion for judicial interference with the legislative and constitutional processes of the State of Hawaii.

12. That there has not been an adequate opportunity for the legislature and the people of Hawaii to consider the problems of reapportionment and to act thereon, and that should the present legislative session adjourn without agreement thereon, the new legislature would be elected in 1964 should be given an opportunity to take appropriate action.

Wherefore, said intervenors pray that the complaint herein be dismissed.

Cross-Claim

As an alternative to the dismissal of this action as above prayed, the intervenors allege that should the provisions of Hawaiian constitutional and statutory laws be held invalid by this Court, that:

1. There is no reason to believe that the legislature to be elected in 1964 will not with reasonable dispatch take the necessary action to provide valid apportionment consti-
[fol. 86] tutional and statutory provisions.

2. If such action is not taken, then in granting relief, this Court should decree the calling of a Constitutional

Convention in the manner provided in the Constitution of the State of Hawaii and in legislation already passed by the Senate of Hawaii.

3. Should this Court decree a judicial reapportionment, it should not reapportion the House of Representatives of the State of Hawaii, and any reapportionment of the Senate of the State of Hawaii should be on the basis set forth in House Bill 3, Senate Draft 1, that is, on the basis of one senator allocated to each county and the remaining senators allocated on the basis of the number of registered voters.

Wherefore, intervenors alternatively pray for action in the manner set forth in this cross-claim.

Dated: Honolulu, Hawaii, August 21, 1964.

Frank D. Padgett, 312 Castle & Cooke Building, Honolulu, Hawaii, Attorney for Intervenors, Defendants.

Robertson, Castle & Anthony, Of Counsel.

[fol. 87] [File endorsement omitted]

[fol. 92]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

Civil No. 2308

HENRIETTA DAVIDSON HOLT, JAMES ROBINSON HOLT, CARL J. GUNTERT, ELMER G. LEEHMAN, JOHN J. MEDEIROS and WILLIAM P. LACY, Plaintiffs,

vs.

WILLIAM S. RICHARDSON, Lieutenant Governor of Hawaii, Defendant,

ELMER F. CRAVALHO, WILLIAM M. FURTADO, and HOWARD Y. MIYAKE for themselves and all other members of the House of Representatives, Second Legislature, State of Hawaii, Intervenors.

ANSWER OF ELMER F. CRAVALHO, ET AL.—
Filed August 24, 1964

Elmer F. Cravalho, William M. Furtado, and Howard Y. Miyake for themselves and all other members of the House of Representatives, Second Legislature, State of Hawaii, hereinafter referred to as intervenors, answering plaintiffs' complaint, state as follows:

I

They admit the allegations of paragraph I.

II

They admit that plaintiffs' request for a three Judge District Court pursuant to 28 U.S.C., Secs. 2281 et seq. is appropriate. They deny the remaining allegations of paragraph II.

III

They are without knowledge or information sufficient to form a belief as to the truths of the averments of paragraph III.

[fol. 93]

IV

They admit the allegations of paragraph IV.

V

They deny that the sections of the constitution of the State of Hawaii which apportion members of the House of Representatives are invalid. They are without knowledge or information sufficient to form a belief as to the truth of the other averments of paragraph V.

VI

They admit the allegations of paragraph VI.

VII

They admit the allegations of paragraph VII.

VIII

They admit the allegations of paragraph VIII.

IX

They admit that the apportionment plan covering the Senate and House of Representatives is an integrated apportionment scheme for over-all legislative representation but deny that any invalidity of the apportionment of the Senate invalidates the apportionment of the House of Representatives, as alleged in paragraph IX.

X

They are without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph X.

XI

They admit that the House of Representatives was reapportioned in 1959 on the basis of reigstered voters in the 1958 general election. They deny that such reapportionment was or is now invalid. They admit that 1960 population figures stated are from the Federal Census but deny [fol. 94] that they may be used to show invalidity of the reapportionment of the House of Representatives. They deny the remaining allegations of paragraph XI.

XII

As for paragraph XII they deny that Article III, Sections 3 and 4 and Article XVI, Section 1 violate the Fourteenth Amendment of the Constitution of the United States, are without knowledge or information sufficient to form a belief as to the truth of the matters as to population and apportionment set forth in Exhibit "C" of the Complaint and deny that such Exhibit "C" shows or tends to show that said Article III, Sections 3 and 4 and Article XVI, Section 1 are invalid.

XIII

They deny the averments of paragraph XIII alleging debasement of plaintiffs' votes as resulting from unconstitutional apportionment of the House of Representatives and deny that such apportionment denied plaintiffs due process or equal protection of the laws.

XIV

They neither admit nor deny the truth of the averments of paragraph XIV.

XV

They deny the allegations of paragraph XV.

XVI

They deny that plaintiffs' interests can only be protected by a decree declaring Article III, Sections 2, 3, and 4 and

Article XVI, Section 1, and the proviso at the end of the sixth paragraph in Section 2 of Article XV of the state constitution to be unconstitutional or by enjoining defendant from performing acts and duties under said provisions as alleged in paragraph XVI.

[fol. 95]

XVII

They deny the allegations of paragraph XVII.

XVIII

For further answer, they state that this Court should not enjoin the 1964 election of members of the Senate and House of Representatives as said election is so imminent as to preclude any reasonable alternative apportionment plans.

Wherefore intervenors pray that:

1. This Court determine that Article III, Sections 3 and 4 and Article XVI, Section 1 of the constitution of the State of Hawaii are valid and constitutional.

2. This Court refuse to enjoin the defendant from performing his statutory duties with respect to the 1964 elections of senators and representatives of the legislature of the State of Hawaii.

3. This Court refuse to interfere with the conduct of said elections, by requiring such elections to be conducted on an at-large basis or by interfering therewith in any other way.

4. This Court, in the event the aforesaid provisions of the constitution of the State of Hawaii, or any of them, are determined to be invalid, abstain from directing any change in said provisions, or in the present apportionment of the legislature of the State of Hawaii, until the people of Hawaii have had a reasonable opportunity to amend the provisions determined to be invalid in the manner established by said Constitution.

5. This Court grant such other and further relief as it may deem meet and proper.

[fol. 96] Dated: Honolulu, Hawaii, this 24th day of August, 1964.

James T. Funaki, Attorney, House of Representatives, State of Hawaii, Iolani Palace, Honolulu, Hawaii, Counsel for Applicants for Intervention.

[fol. 330]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

Civil No. 2308

HENRIETTA DAVIDSON HOLT, et al., Plaintiffs,

vs.

WILLIAM S. RICHARDSON, Lieutenant Governor of Hawaii, Defendant.

PRE-TRIAL ORDER—Filed January 11, 1965

[fol. 331] I.

Jurisdiction

Jurisdiction is vested in this Court, by virtue of the allegations in the Complaint of the plaintiffs that the state legislature is arbitrarily and capriciously apportioned and the plaintiffs and all others similarly situated, have had their votes debased and are therefore deprived of equal protection under the law, as guaranteed by the 14th Amendment to the United States Constitution; jurisdiction is fur-

ther vested in this Court by the Civil Rights Act, 42 U.S.C. §§ 1983, 1988 and under 28 U.S.C. §§ 2201 and 2281 et seq.

II.

Admitted Facts

The following facts are admitted by the parties:

1. That each of the plaintiffs is a citizen, resident and qualified voter in the respective senatorial and representative districts as alleged in paragraph III of the Complaint.

2. That defendant Richardson is the duly elected, qualified and acting Lieutenant Governor of the State of Hawaii and as such is responsible for the supervision of elections, [fol. 332] pursuant to Section 14-8 and Chapter 11, Revised Laws of Hawaii 1955, as amended, and such other statutory duties related thereto, as alleged in paragraph IV of the Complaint.

3. That the House of Representatives was reapportioned by the Governor in 1959 on the basis of 1958 registered voters, pursuant to Article III, Section 4 of the Constitution of the State of Hawaii.

4. That the Second Legislature of the State of Hawaii was convened in a special session on July 28, 1964, and adjourned on August 26, 1964, without enacting any statute initiating any procedure for reapportioning the legislature.

5. That according to the 1960 federal census, the total population of the State of Hawaii was 632,772; there were 175,317 registered voters in 1958, 202,059 in 1960, 221,650 in 1962, and 239,285 in 1964.

6. That a tabulation of the 1960 population, the registered voters for the years 1958, 1960, 1962 and 1964 in each of the senatorial and representative districts and the number of legislators representing each of said districts shows the following:

The Senate	1960 Population	1958 Reg. Voters	1960 Reg. Voters	1962 Reg. Voters	1964 Reg. Voters	Legislators
First—Hawaii	44,297	19,031	19,266	20,053	20,739	5
Second—Hawaii	17,035	6,503	6,793	7,141	7,359	2
Third—Maui	42,855	16,755	17,539	18,325	18,752	5
Fourth—Oahu	182,307	62,398	73,981	80,490	87,209	5
Fifth—Oahu	318,102	59,249	73,142	83,834	92,960	5
Sixth—Kauai	28,176	11,381	11,338	11,807	12,266	3

[fol. 333]

The House	1960 Population	1958 Reg. Voters	1960 Reg. Voters	1962 Reg. Voters	1964 Reg. Voters	Legislators
First—Hawaii	5,030	2,209	2,257	2,319	2,399	1
Second—Hawaii	31,553	13,836	14,036	14,706	15,274	3
Third—Hawaii	7,714	2,986	2,973	3,028	3,066	1
Fourth—Hawaii	11,369	3,862	4,073	4,239	4,329	1
Fifth—Hawaii	5,666	2,641	2,720	2,902	3,030	1
Sixth—Maui	7,138	2,560	2,574	2,739	2,897	1
Seventh—Maui	35,717	14,195	14,965	15,586	15,855	4
Eighth—Oahu	68,281	13,876	18,369	22,450	27,073	4
Ninth—Oahu	42,816	5,929	7,410	7,973	8,934	2
Tenth—Oahu	95,118	12,926	17,003	20,861	23,859	4
Eleventh—Oahu	57,743	10,525	12,553	14,401	15,148	3
Twelfth—Oahu	25,552	8,372	10,000	10,889	11,500	3
Thirteenth—Oahu	28,592	7,621	7,807	7,260	6,446	2
Fourteenth—Oahu	42,476	14,134	16,056	17,305	18,571	4
Fifteenth—Oahu	60,125	21,063	25,869	28,685	31,302	6
Sixteenth—Oahu	42,750	13,746	16,176	17,072	18,201	4
Seventeenth—Oahu	36,956	13,455	15,880	17,428	19,135	4
Eighteenth—Kauai	28,176	11,381	11,338	11,807	12,266	3

The first, second, third and sixth senatorial districts contain 21% of the 1960 population of the State. They elect 15 of the 25 senators (60%). The fourth and fifth senatorial districts contain 79% of the 1960 population of the State. They elect 10 of the 25 senators (40%).

7. That if each of the 25 senators represented exactly the same number of persons or registered voters, then each senator would represent 25,311 persons according to the 1960 federal census, or 7,012 registered voters according to 1958 voter registration, or 8,082 registered voters in 1960, or 8,866 registered voters in 1962, or 9,571 registered voters in 1964. Deviations from these averages (lowest and

highest) in terms of per capita representation may be illustrated as follows:

[fol. 334] Each Senator Represents

	1960 Population	1958 Reg. Voters	1960 Reg. Voters	1962 Reg. Voters	1964 Reg. Voters
Average (25 Senators)	25,311	7,012	8,082	8,866	9,571
2nd—Hawaii (2 Senators)	8,518 (lowest)	3,251 (lowest)	3,396 (lowest)	3,571 (lowest)	3,678 (lowest)
4th—Oahu (5 Senators)	36,461	12,479 (highest)	14,796 (highest)	16,098	17,442
5th—Oahu (5 Senators)	62,620 (highest)	11,850	14,628	16,767 (highest)	18,592 (highest)

8. That if each of the 51 representatives represented exactly the same number of persons or registered voters, then each representative would represent 12,407 persons according to the 1960 federal census, or 3,437 registered voters according to 1958 voter registration, or 3,962 registered voters in 1960, or 4,346 registered voters in 1962, or 4,691 registered voters in 1964. Deviations from these averages (lowest and highest) in terms of per capita representation may be illustrated as follows:

Each Representative Represents

	1960 Population	1958 Reg. Voters	1960 Reg. Voters	1962 Reg. Voters	1964 Reg. Voters
Average (51 Representatives)	12,407	3,437	3,962	4,346	4,691
1st—Hawaii (1 Representative)	5,030 (lowest)	2,209 (lowest)	2,257 (lowest)	2,319 (lowest)	2,399 (lowest)
8th—Oahu (4 Representatives)	17,070	3,469 (highest)	4,592 (highest)	5,610 (highest)	6,768 (highest)
10th—Oahu (4 Representatives)	23,779 (highest)	3,231	4,251	5,215	5,965

[fol. 335] 9. The State of Hawaii has but four political subdivisions, each one a county. Each county is physically separated from every other county.

III.

Witnesses and Exhibits

Each party reserves the right to introduce further evidence by additional witnesses or exhibits.

IV.

Issues of Fact

1. The distribution of the population throughout the State of Hawaii in terms of eligible voters.

2. The historical development of the senatorial and representative districts.

3. The policy of the State of Hawaii regarding voter eligibility.

V.

Issues of Law

The following are the issues to be determined by the Court:

1. Is the existing apportionment of the legislature of the State of Hawaii unconstitutional, in whole or in part?

2. May the State of Hawaii choose either (a) gross population, (b) eligible voters, or (c) registered voters as a basis for apportionment of its legislature?

3. Does the invalidity of the apportionment in the Senate of the Hawaii legislature necessarily invalidate the apportionment of the House of Representatives?

[fol. 336] 4. Is the proviso in the sixth paragraph of Section 2 in Article XV of the Hawaii Constitution relating to constitutional amendments valid?

5. Are the provisions in Article III, Sections 2 and 3 of the Hawaii Constitution which determine the number of senators and representatives respectively, severable from the remainder of the provisions of the Constitution relating to apportionment of the Senate and the House of Representatives, assuming the latter are valid?

6. Does the legislature have the power to reapportion by statute, at least pending adoption of a valid constitutional amendment?

7. May a reapportionment plan cut off the term of a hold-over senator when the same is necessary to effectuate such plan?

8. Is an apportionment scheme which provides for a mixture of single-member and multi-member districts or multi-member districts with varying numbers of legislators from each in one house valid?

9. Is a plan which apportions one senator to each county regardless of population, then apportions the remaining senators among the senatorial districts on the basis of population or registered voters valid?

10. What relief may be properly granted in this case?

VI.

Action by the Court

1. A three-Judge District Court was convened on August 25, 1964, to hear plaintiffs' motion for a preliminary injunction, in accordance with the provisions of 28 U.S.C. 2281 and 2284.

2. In the hearing before the three-Judge Court on August 25, 26 and 27, 1964, the Court granted the several Motions to Intervene by the following parties:

[fol. 337] (a) As Intervenors-Plaintiff: John A. Burns, Governor, State of Hawaii, John J. Hulten, George M. Okano, George R. Ariyoshi, O. Vincent Esposito,

Mitsuyuki Kido, Patsy T. Mink, Sakae Takahashi, and Vincent H. Yano, members of the Legislature of the State of Hawaii.

(b) As Intervenors-Defendant: Nelson K. Doi, Kazuhisa Abe, Toshi Ansai, Francis M. F. Ching, William H. Hill, Bernard C. Kinney, Benjamin Menor, Noboru Miyake, Thomas S. Ogata, Clinton I. Shiraishi, David K. Trask, Jr., John T. Ushijima, and Julian R. Yates, Sr.

(c) As Intervenors-Defendant: Elmer F. Cravalho, William M. Furtado and Howard Y. Miyake, for themselves and other members of the House of Representatives, Second Legislature, State of Hawaii.

3. The Court allowed the following exhibits into evidence:

(a) By the Plaintiffs:

1—Tabulation of Population and Registered Voters

2—House Conferees' Report No. 1 Re: H.B. 3, H.D. 1, S.D. 1

2A—H.B. 3, H.D. 1

3—Letter to Lieutenant Governor dated July 10, 1964

4—Reply from Lieutenant Governor dated July 13, 1964

5—Map—City of Honolulu (Enumeration Districts and Census Tracts)

6—Map—County of Maui

6A—Map—Island of Maui

6B—Map—Wailuku and Kahului Complex

6C—Map—Islands of Molokai and Lanai

[fol. 338] 7—Map—Island of Hawaii (Proposed Districts)

8—Map—Island of Oahu, Single Member Districts (51 House—25 Senate)

9—Map—Island of Kauai (Proposed Districts)

10—Explanation of Method Equal Proportions, Constitutional Convention Proceedings Volume 2, Page 115

11—Standing Committee Report No. 92, Constitutional Convention 1950

(b) By the Intervenors-Plaintiff:

1—Tabulation of Population and Averages on Representation

2—Statement of Wirtz on Apportionment, Constitutional Convention

(c) By the Defendant:

A—Testimony of Robert Schmitt to Senate dated July 24, 1964 and Tables

(d) By the Intervenors-Defendant (Neighbor Island Senators):

S1—Committee of the Whole Report No. 1 Re: S.B. 3

S2—Committee of the Whole Report No. 2 Re: S.B. 12, S.D. 1

S3—Committee of the Whole Report No. 3 (with Appendix A and B) Re: H.B. 3, H.D. 1, S.D. 1

S4—Committee of the Whole Report No. 4 Re: S.B. 10 10

All House Bills (H.B.), Senate Bills (S.B.) and Committee Reports mentioned in the above list of exhibits in evidence refer to those measures which were before the Second Legislature of the State of Hawaii in its 1964 Special Session.

[fol. 339] It is therefore agreed by the parties in the above styled cause that the above shall be binding upon all parties unless hereafter modified by order of the Court.

Dated: Honolulu, Hawaii, this 10th day of December, 1964.

Charles M. Tonaki, attorney for Henrietta Davidson Holt et al., Plaintiffs.

Robert G. Dodge, attorney for William S. Richardson, Defendant.

Bert T. Kobayashi, Attorney General, for John J. Hulten et al., Intervenors-Plaintiffs.

Frank D. Padgett, attorney for Nelson K. Doi, et al., Intervenors-Defendants.

James T. Funaki, attorney for Elmer F. Cravalho, et al., Intervenors-Defendants.

It Is So Ordered:

Martin Pence, Judge of the above-entitled Court.

[File endorsement omitted]

[fol. 370]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

Civil No. 2308

HENRIETTA DAVIDSON HOLT, et al., Plaintiffs,

vs.

WILLIAM S. RICHARDSON, Lieutenant Governor of Hawaii, Defendant,

JOHN J. HULTEN, et al., Members of the Legislature of the State of Hawaii, and JOHN A. BURNS, Governor of Hawaii, Intervenors-Plaintiffs,

NELSON K. DOI, et al., Members of the Senate, Second Legislature, State of Hawaii, Intervenors-Defendants,

ELMER F. CRAVALHO, et al., Members of the House of Representatives, Second Legislature, State of Hawaii, Intervenors-Defendants.

DECISION AND ORDER—February 17, 1965

On August 13, 1964, the plaintiffs, citizens and residents of the State of Hawaii and qualified voters in their respective senatorial and representative districts, on their own behalf and as a class action on behalf of all other citizens, residents and voters in the State of Hawaii similarly situated, filed this complaint against William S. Richardson, Lieutenant Governor of Hawaii (he being responsible for the supervision of elections), seeking to enjoin Richardson from performing any duties relating to the nomination and election of candidates for State legislative offices unless the [fol. 371] State legislature enacted a valid reapportionment

plan for use in the 1964 elections, praying that this court should in any event make certain that the 1966 election would be conducted under an apportionment plan that would meet the requirements of the Fourteenth Amendment to the Constitution of the United States.

Plaintiffs alleged that the Constitution of the State of Hawaii apportioned the senate on the basis of geography and not population, and the house of representatives on the basis of registered voters and not population, and thus the State's scheme of apportionment was unconstitutional under the Fourteenth Amendment, in the light of *Reynolds* v. *Sims*, 377 U.S. 533 (1964), and its companion cases of the same date: *Maryland Committee* v. *Tawes, Lucas* v. *Colorado General Assembly, Davis* v. *Mann, WMCA* v. *Lomenzo* and *Roman* v. *Sincock.*

The Governor of the State, as well as all state legislators, both senators and representatives, filed their appearance as either intervening plaintiffs or defendants. (After the 1964 elections, all but one of the newly elected legislators likewise filed their appearance.)

A three-judge district court thereafter convened, found that it had jurisdiction under 28 U.S.C. Secs. 2201 and 2281 et seq., as well as under the Civil Rights Act, 42 U.S.C. Secs. 1983, 1988, and the court, after full hearing, on August 26, 1964, because of the imminence of the 1964 elections and the disruptive effects which an injunction would have had thereon, and because the State legislature at that date was convened in special session for the specific purpose of considering the problems of reapportionment, denied the motion for a preliminary injunction and set a hearing on the merits for January 11, 1965. (*Cf. Roman* v. *Sincock, supra.*) The legislature failed to agree on any reapportionment plan, [fol. 372] and this decision follows the January hearing.

The Constitution of the State of Hawaii, after being hammered out at a Constitutional Convention composed of nonpartisan delegates elected from all parts of the Territory, was adopted July 22, 1950, to become effective immediately upon the admission of Hawaii into the Union as a state.

Hawaii was so admitted on August 21, 1959. The Constitution prescribes a senate of 25 members, obviously and admittedly apportioned basically upon the geographical and political divisions of the State, and 51 representatives apportioned as hereinafter described.

Hawaii is unique in many respects. It is the only state that has been successively an absolute monarchy, a constitutional monarchy, a republic, and then a territory of the United States before its admission as a state. Because each was insulated from the other by wide channels and high seas (*C.A.B.* v. *Island Airlines,* —— F.Supp. —— (October 8, 1964)) and historically ruled first by chiefs and then royal governors, after annexation the seven major, inhabited islands of the State were divided up into the four counties of Kauai, Maui, Hawaii and the City and County of Honolulu.[1] All this resulted in a strongly centralized form of government.

By 1950, Honolulu, the State capital, had by far the largest population of any county, an essentially urban population, and had become an industrial, manufacturing, military and tourist center. The other three counties remained essentially rural and primarily concerned with agri- [fol. 373] culture and ranching. With the State having complete control over the judiciary, taxation, education, public health and welfare, etc., it was normal therefore that the three more rural counties of Kauai, Maui and Hawaii would not wish to leave such centralized power, particularly control over the State's purse strings, with urban Honolulu.

Patterning itself after the makeup of the United States Congress, Article III, Section 2 of the State Constitution apportioned the 25-member senate on a basis which enabled the senators of the three counties outside of Honolulu to have numerical control over that body. This was deliber-

[1] The artificial and isolated County of Kalawao has always been strictly a Hansen's disease treatment area, operated and controlled by the Board of Health of the Territory and State. It votes with Maui County for State Legislators.

ately done in order to preserve the then nationally approved concept of checks and balances between rural and urban populations.

By Article III, Section 4, the house of representatives was apportioned under "the method of equal proportions," i.e., the same method as used in apportioning the members of the House of Representatives of the United States Congress,[2] giving the representatives from the County of Honolulu, with its larger population, potential control of the house. Both single and multi-member representative districts were set up throughout the State.

Under this same Section 4, using the method of equal proportions, the State legislators were apportioned among the four "basic areas", viz., the four counties, on the basis of the number of voters registered at the last preceding general election, and within the counties each representative district had its representation determined by the same [fol. 374] method.

Under this same Section 4, the governor was mandated to reapportion the members of the house of representatives on or before June 1 of the year 1959, and at successive 10-year intervals thereafter. On May 1, 1959 (pursuant to Public Law 895, 84th Congress, 2nd Session), the Governor of Hawaii did reapportion the State in the above manner, and such reapportionment transferred increasing control to Honolulu.[3]

All parties before this court conceded (as was also determined by the Supreme Court of Hawaii in *Guntert* v. *Richardson*, 47 Hawaii —— (July 27, 1964)) that Article III, Section 2, relating to the composition and apportionment of the State senate is indisputably invalid under *Reynolds* v. *Sims, supra.*

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[2] Proceedings of the Constitutional Convention of Hawaii, Volume II (Proceedings), pp. 112-123. See also, *Reynolds* v. *Sims, supra*, note 10.

[3] After the Constitutional Convention, Congress put into permanent effect the reapportionment provisions of the proposed State Constitution. (*Davis* v. *Quinn*, 43 Hawaii 261, 269.)

From the inception therefore, it was obvious that Hawaii's Constitution must be amended, at least to provide for a valid apportionment of its senate. In connection with any constitutional reapportionment of the senate, it must be noted that Article XV (Revision and Amendment), Section 2, para. 6, contains the following proviso:

> " . . . provided, that no constitutional amendment altering this proviso or the representation from any senatorial district in the senate shall become effective unless it shall also be approved by a majority of the votes tallied upon the question in each of a majority of the counties."

As appears in the Proceedings, pp. 761-64, this proviso was specifically inserted in order to freeze representation in the senate, and it gave to the rural counties what amounted to the right of veto over any attempt to change the representative makeup of the senate. This proviso is so [fol. 375] closely tied in with the admittedly invalid scheme of senatorial apportionment that it, too, is likewise constitutionally invalid and falls along with Article III, Section 2.

Plaintiffs urge that Article III, Sections 3 and 4, relating to apportionment of the house, are likewise invalid because they are a part of the total scheme of legislative apportionment, inferring that the house would not have been apportioned as it was but for the senate being apportioned as a built-in check in setting up the "checks and balance" scheme of the United States Congress.

This Court finds that this is not necessarily true. Apart from one problem discussed immediately below, nothing has been called to our attention and we find no evidence—not even in the Proceedings—that the Constitutional Convention would have apportioned the house in any other way than it did.[4]

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[4] In connection with both the senate and the house of representatives, plaintiffs have claimed that the *number* of legislators in each house, viz., 25 and 51, are part of some invidious scheme. Exhibit

Plaintiffs urge that in any event, the house of representatives is unconstitutionally apportioned because apportionment thereof is based upon the number of voters registered at the last preceding general election (Art. III, Sec. 4), and not upon a gross, i.e., total population basis.

Article II, Sections 1 and 2, covering suffrage and elections, provides, in substance, that every literate United States Citizen who is compos mentis and not an unpardoned felon, 20 years old or more, residing in the State not less [fol. 376] than one year next preceding the election, and a registered voter, shall be qualified to vote. This Court finds nothing in Article II which is constitutionally invidious as discriminating against any one on the basis of race, color, creed, employment or geographical location, and as indicated in Article III, Sections 2 and 3, defining who may elect senators and representatives, it appears that the term "qualified voters" is used practically synonymously with registered voters under Article III, Section 4.

This court is not prepared at this time to accept plaintiff's premise that total population is the *only* basis upon which apportionment of state legislatures can constitutionally be based. The Court in *WMCA* v. *Lomenzo, supra,* notes that "New York uses citizen population instead of total population, excluding aliens . . . , for purposes of legislative apportionment" and apparently found nothing invidious in that fact. In *Maryland Committee* v. *Tawes, supra,* the Court said:

> "Rather, the proper, and indeed indispensable, subject for judicial focus in a legislative apportionment controversy is the overall representation accorded to the

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14, Table 14 clearly illustrates that there is no built-in magic or invidiousness in the use of such numbers. The matter of the size of each legislative body and the adoption of a 15-member senate and 31-member house, or a 21-member senate and 41-member house, as well as the ultimately approved 25-member senate and 51-member house were thoroughly explored by the Convention (Proceedings, pp. 89-101, 112-132).

> *State's voters,* in both houses of a bicameral state legislature." (Emphasis added.)

The Court thus re-expressed what it said in *Gray* v. *Sanders,* 372 U. S. 368, 379:

> "Once the geographical unit for which a representative is to be chosen is designated, *all who participate in the election* are to have an equal vote—whatever their race, . . . their income, and wherever their home may be in the geographical unit." (Emphasis added.)

The Court has said time after time throughout *Reynolds* v. *Sims, supra,* and the companion cases only that "both houses must be apportioned substantially on a population basis." (Emphasis added.)

Plaintiffs urge and have presented figures showing that [fol. 377] on the basis of the 1960, 1962 and 1964 population, the house of representatives is malapportioned. To begin with, paraphrasing *Guntert* v. *Richardson, supra,* 1950 and 1958 registered voters, and 1960, 1962 and 1964 population, are not comparable figures. The Court does not demand that legislatures be reapportioned annually. *Reynolds* v. *Sims, supra,* Subject VIII. This Court, at this time, can only determine if the basis of apportionment, when adopted in 1950 and when used for reapportionment in 1959, did in fact at those times result in apportionment "substantially on a population basis."

The Convention tried "to write into this Constitution a proposal that would not deny a single individual in this territory the right to suffrage." (Proceedings, p. 49) The basis of apportionment by population vs. registered voters was thoroughly discussed.

> "The idea among other things was to make the districts as nearly equal population-wise as possible . . . " (Proceedings, p. 107)
>
> . . . .

"One of the reasons why the reapportionment directed by the Organic Act[5] was not carried out was because that act required reapportionment on the basis of citizen population. A breakdown of the population according to this standard has not been locally available. Total population figures for the territory are shown by census tracts which do not necessarily coincide with locally defined areas. As a practical matter, the number of registered voters was found to bear a reliable and fairly uniform relationship to total population, although it favors slightly the neighbor islands where the percentage of persons who have registered to vote is from one to two per cent higher than for Oahu. It was in recognition of the potential difficulty in obtaining figures which would show citizen population, or figures which would show total population by desirable districts, that the basis for reapportionment of the members of the House was chosen as the number of registered voters." (Proceedings, p. 107)

[fol. 378] "The problem as stated in the report and as stated by the committee chairman this morning of using population in these districts is that it is next to impossible to obtain accurate population figures for the districts that we want to use or even for the old precincts or for any districts, unless you should take your representative districts to be the same districts that are used by the Census Bureau. Now it is quite possible that by the next census we could convince the Census Bureau that they should break their areas up into the areas that we may decide upon for representatives.

"... [I]n checking this over in the committee we found that there was actually percentage wise or using the method of equal proportions or anything else, very little difference whether we used registered voters, votes cast or population." (Proceedings, p. 124)

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[5] Organic Act, Secs. 60, 62.

The testimony of Robert Schmitt[6] (see Transcript of Proceedings of August 1964 hearings (TR) beginning p. 80) illustrated with certainty that the term "population" as determined by the Census Bureau was far from an accurate or reliable method of determining the true number of *residents* of a given area—at least in Hawaii.

> "The 1960 Census definition of population used in its compilation, . . . included all armed forces stationed ashore in Hawaii, regardless of their legal or voting residence. It included all men aboard ships in Hawaii ports on the census date . . . April 1st, 1960; that is [if] a ship tied up in Kapalama Basin or in Pearl Harbor, Ford Island, the entire crew of that ship was assigned to that geographic area.
> [fol. 379]
> "This was also true in the case of civilian ships. For example, the Ala Wai Yacht Harbor included a number of house boats and yachts which were enumerated in Hawaii." (TR 80)
>
> " . . . If the person on the night preceding the census had been there . . . each hotel or transient accommodation was enumerated . . .
>
> "[T]hey enumerated every person in Hawaii at that time, but they then reallocated them to their home states . . . " (TR 81)

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[6] Robert Schmitt: employed by the Department of Planning and Economic Development of the State of Hawaii; a member of the American Statistical Association; member of the Population Association of America and author of some 60 articles in professional journals; Research Development Analyst in charge of the Research Division of the Honolulu Redevelopment Agency for four years; in charge of research for the Seattle City Planning Commission; author and editor of the Statistical Abstracts of Hawaii; census tract key person for Honlulu of the U. S. Bureau of Census for many years; holds a Master's Degree from the University of Cincinnati, with additional graduate work from the University of Hawaii, University of Michigan and the University of Washington (TR 69-70).

"... We don't know how many were here at that time. *But we made an estimate* ... The Census Bureau did *not* report how many such persons were reallocated." (Emphasis added.) (TR 82)

"... There is no certainty how many were reallocated. We assume that all of them were." (TR 83)

"There were two ships [picked up in the 1960 census], one the Kiwishiwi ... and the other the Black Hawk ... [T]he total personnel of perhaps four hundred ... were assigned to [an area of Waikiki along the Ala Wai Canal] ... [H]ere we had approximately four hundred of the ship's crews ... classified as military ... who were assigned to this [Waikiki] enumeration district ...

"[I]n 1920 ... they inadvertently threw 3,000 Pearl Harbor people into the ... Honolulu judicial district." (TR 106-07)

"In 1960, the number of members of the Armed Forces ... was either 54,000 or 47,000 ... [or 42,122 if we subtract the 1960 civilian population of 590,650 from 632,772—See Ex. 14, p. 12], the census count was 47,000, and the Department of Defense counted 54,000." (TR 116)

Since the total civilian population of Hawaii (excluding the military) in 1960 was but 585,505 (Ex. 14, Table 12), it is seen that the military did account for about 10% of the total population. (1960 Census estimate, Ex. 15, Table 9.) Hawaii has become the United States' military bastion for the entire Pacific and the military population in the State fluctuates violently as the Asiatic spots of trouble arise and disappear. If total population were to be the only acceptable criteria upon which legislative representation could be based, in Hawaii, grossly absurd and disastrous results would flow from a blind adherence to "the elusive 'one-person-one-vote' aphorism." (Mr. Justice Har-

[fol. 380] lan in *Fortson* v. *Toombs,* —— U.S. —— (January 18, 1965).)

For example, if Hawaii's reapportionment year had been 1944, when the civilian population was 464,250 and the military population was 407,000, then areas which normally might have a total population entitling them to but a small percentage of the total number of legislators would suddenly find themselves controlling over 90% of the legislature—for the following ten years!

In contrast to the above, in 1950, with a civilian population of 472,780, there were but 21,000 military in Hawaii—less than 5%. In two years, this had jumped to 55,000. In 1958 there were 55,000 military, with a civilian population of 555,222. Two years later, there were 79,000 military in Hawaii. (Ex. 15, Table 11) As the plaintiffs have admitted, if the State were reapportioned at the present time on a straight total population basis, the *Fifth* senatorial district, containing within its bounds most of the military and naval installations of the State, would be entitled to 13 senators—a majority of the Senate!

A theoretical proposed redistricting of the City and County of Honolulu (Ex. 8) based on total population under the *1960* census, with the primary consideration being substantial equality of *total population,* gave Oahu 20 senators out of 25, and 41 representatives out of 51. (TR 189—Schmitt) A result of such proposed redistricting was that the largest representative district in point of population would be the one that included Schofield Barracks "in fact, it is completely Schofield Barracks," (TR 190) i.e., military population. Although it would thus become the largest representative district in the State, "in point of registered voters [it would be] the smallest district on the island." (TR 191) And Schmitt admitted, in testifying con-[fol. 381] cerning Exhibit 17, that it was possible in a single representative district so reapportioned on a total population basis, for such a district to have almost no voters at all.

This court does not have before it the problem presented to the Supreme Court of Hawaii in *In Re Robinson, Jr.*, No. 4465, Memorandum Opinion (October 30, 1964), rehearing granted January 18, 1965, viz., the question of whether a serviceman's residence on a Federal military reservation precludes him from establishing his residence in Hawaii. If he so desires to become a resident of Hawaii, this court can only state that there is nothing in the State Constitution or the Hawaii statutes which per se excludes members of the armed forces from establishing their residence in Hawaii and thereafter becoming eligible to vote. This court finds no scheme in Hawaii's Constitution or in the statutes implementing the exercise of franchise which is aimed at disenfranchising the military or any other group of citizens.

Not only does the fluctuating military population of the State make representation on the basis of total population politically suspect, but the large number of tourists[7] who continually flow in and out of the State and who, as above indicated, for census purposes are initially at least, counted as part of Hawaii's census population (10,000 estimated, 1960 census), would likewise result in gross inequity to citizens of the State eligible to vote, if total population were held to be the only constitutional basis for reapportionment in Hawaii.

[fol. 382] The difficulties undoubtedly faced by the Constitutional Convention in determining the best method to set up a system giving equality of representation is further illustrated by references contained in Exhibit 14 on statistics based on the year 1960—not the year 1950 when the Constitution was adopted, or 1959 when the house of representatives was reapportioned. Exhibit 14, Table 1 shows that the total *civilian* population as of July 1st, 1960 was 590,650, with 202,059 registered voters or 34.2% registered. Table 3

[7] The Hawaii Visitors Bureau statistics show that tourists in Hawaii, for overnight or longer, numbered—in 1950, 46,593; in 1958, 171,588; in 1960, 296,517; in 1962, 362,145; in 1964, 510,000 (preliminary figure).

shows the *total* population as 632,772, thus indicating but 31.9% of the population as having registered. Table 4, however, shows that out of the State population of 312,478 *United States citizens* (thus including the military) of voting age, the 202,059 registered voters accounts for 64.7% of all that class. Table 5 indicates that out of the *total* population age 20 or over (thus including non-citizens), of 360,193, 231,914 could qualify as being eligible to register. Thus even in 1960, the registered voters actually accounted for 87.1% of all of the possible *voting population* of the State of Hawaii.

That, in Hawaii, apportionment on a registered voter basis is not invidious per se, is further illustrated by Exhibit 14, Table 13, wherein it appears that 19 senators would be apportioned to Honolulu regardless of whether the basis was registered voters in the 1962 election or civilian population. Likewise, there is shown but a difference of two representatives (38-40) for Honolulu in such projected apportionment of the house, a difference which might result from the application of the method of equal proportions.

Hawaii's centralized education system has resulted in an unusually literate citizenry, and interest in politics and strong drives to bring out the vote have resulted in a vote of from 88 to 93.6% of all registered voters during [fol. 383] the elections of 1958, 1959,[8] 1960 and 1962. (Ex. 14, p. 12)

Representation based upon those eligible to vote, rather than registered voters, might conceivably have been a better solution, but neither in 1950 nor in 1958, as Schmitt testified (TR 96-98), was there statistical data available from which the necessary figures could have been gleaned and applied to the representative districts. As he also said, any attempt to determine the number of military personnel or their dependents who are eligible to vote in Hawaii by representative district "would strain the available statistical sources to the breaking point." (TR 98)

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[8] First political implementation under Statehood.

This Court does not hold that registered voters as a basis for representation is the perfect basis. Paraphrasing the words of the Court in *Fortson* v. *Dorsey,* —— U.S. —— this court finds the use of registered voters as a basis of apportionment did not, in Hawaii, in fact "designedly or otherwise . . . operate to minimize or cancel out the voting strength of [any] . . . elements of the voting population." (At p. ——) Nor did it in 1959 bring about that result.

As the records of the Constitutional Convention show (Proceedings 103-111), the districting, both for the senate and the house of representatives, followed along historical, political, geographic and physical lines. There was no gerrymandering in the invidious sense. As Dr. Schmitt testified (TR 96), the representative district lines sometimes cross statistical matters reported in the census, because the census divided up the State into census tracts. While for some of the cities of the State block statistics are available, nevertheless it is rather rare when the census [fol. 384] tract coincides with the precinct in an election district. "There seems to have been an unfortunate disregard of precinct boundaries and representative district boundaries in laying out the census tracts and vice versa." (TR 96)

Plaintiffs have pointed to the result of the redistricting in Representative Districts Nos. 1 and 2—Puna and South Hilo on the Island of Hawaii—as proof positive that the districting brought about a result condemned in *Reynolds* v. *Sims, supra,* as unconstitutional, in that in 1959, given a man-average per representative of 3437 voters, Puna with a 1958 registered voter population of but 2209 was given one representative and South Hilo with a registered voter population of 13,836 was given but three (i.e., 4459 voters per representative)—ergo an arbitrary and invidious dilution of the votes of the South Hilo voters! While the Court did state:

"It is inconceivable that a state law to the effect that, in counting votes for legislators, the votes of citizens

> in one part of the State would be multiplied by two, five, or 10, while the votes of person in another area would be counted only at face value, could be constitutionally sustainable",

this broad conclusion, however, was modified a few lines thereafter by the following:

> "Weighting the votes of citizens differently, by any method or means, *merely* because of where they happen to reside, hardly seems justifiable." *Reynolds* v. *Sims, supra.* (Emphasis added.)

As was also stated by Mr. Justice Black in *Colegrove* v. *Green,* 328 U.S. 549, 569-71:

> "[T]he constitutionally guaranteed right to vote and the right to have one's vote counted clearly imply the policy that state election systems, no matter what their form, should be *designed* to give *approximately* equal weight to each vote cast . . . " *Reynolds* v. *Sims, supra,* note 40. (Emphasis added.)

The record of the Proceedings (pp. 139, 141, 157) show [fol. 385] that in an endeavor to make all of the representative districts of the State large enough so that the figures would approach the 1950 common denominator of 2445, Puna (1st Representative District), when combined with Keaukaha (now in the 2nd Representative District) came to 2355. The delegates from South Hilo opposed this because geographically Keaukaha was separated from the nearest inhabited portion of Puna by a lava forest over six miles wide, traversed by but one road. It was an integral part of the City of Hilo, using that city's power, water, police, fire protection, schools and all public services. Its population was almost entirely of Hawaiian extraction; almost all of its inhabitants were employed only in Hilo; and basically, it had no community, ethnic or industrial bond or interest with Puna.

The voting population of Puna, on the other hand, was very predominantly of Japanese extraction, with no urban-

ization whatsoever, and with almost its entire population employed by one sugar plantation.

Keaukaha had 644 voters. It was recognized that the 1711 voters of Puna ethnically, industrially and socially were a cohesive unit, and such districting, as a matter of practical politics, would have left Keaukaha with *no* real representation.

> "[Keaukaha] was put in Puna in the first place . . . [in] . . . an effort to get a larger number of voters in the district that was going to elect one representative. It should be the natural thing to put it in South Hilo as [the delegates from Hawaii County] propose to do it now and it would not disturb the allocation of voters between Puna and South Hilo, and North Hilo and Hamakua." (Proceedings, p. 157)

As a matter of fact, also, neither in Puna nor in South Hilo did the resultant number of voters per representative, then or in 1959, violate the method of equal proportions. This court finds ample justification for and no invidious vote dilution in the above districting.

[fol. 386] As indicated above, this court cannot say that Hawaii's method of districting was part of any invidious scheme to disenfranchise any person or group, or to dilute the vote of any person. In hindsight, this court could say, as did Dr. Schmitt, that for the purpose of determining eligibility to vote in any precinct or district, it would be far easier to secure some such information if the districting and precinct lines also coincide with the census county divisions and census tracts. (TR 96)

There is nothing which appears in the Proceedings (pp. 173-74) to indicate that the ordering of reapportionment of the house in the year preceding that in which the census is normally taken was part of a scheme to dilute the vote of any person, rather, that year was used because the 5th Legislative Session after the Constitutional Convention would have terminated its work in May 1959. Since re-

apportionment was based upon registered voters, the census figures did not appear to the delegates to have any application.

Obviously, if the rights of the citizens of Hawaii are to be protected, the Constitution of the State of Hawaii must be amended—and amended before the 1966 general elections. The action of the legislature in failing to provide for reapportionment during its special session called for that purpose only last summer was disappointing to this court —and undoubtedly to the Supreme Court of Hawaii. See *Guntert* v. *Richardson, supra.*

As pointed out by the Supreme Court of Hawaii in *Guntert,* any change in the representation from any senatorial district must be by constitutional amendment. This court concurs!

Under Article XV, Section 3 of the Hawaii Constitution, [fol. 387] while the legislature may propose amendments to the Constitution, such amendments can only be voted on at a general election. If the legislature at its special reapportionment session of 1964 had proposed any reapportionment amendment, it could have been voted on in the 1964 election, but that legislature did not so act. Having determined that the senate at least, must be reapportioned before the 1966 general election, this court, in the inception, is now compelled to attempt to achieve that result by following the constitutional method provided under Article XV, Section 2. In the event that the constitutional route fails or, if followed, produced an invalid scheme of apportionment, only then would this or any other court be justified in attempting to assume the Herculean task of devising and enforcing a temporary reapportionment system.

In the event that a Constitutional Convention is convened, then in view of the questions and problems which have been raised before this court in this case, as well as before the Supreme Court of Hawaii in *Guntert* v. *Richardson, supra,* the delegates, in addition to providing for reapportionment of the senate, may also wish to reconsider the question of:

1. Whether it will continue to use registered voters as the apportionment basis, or change it to State citizen population eligible to vote (i.e., voter population), or citizen population, or total population.

2. Whether it is better to have one or both houses of the legislature composed of single member representative districts, or to have and justify[9] one or both houses composed, in whole or in part, of multi-member or floterial districts.

3. Whether decennial reapportionment of either or both [fol. 388] houses should be made on or before June 1st of the year preceding the Federal census—as is now the case —or on a date soon after the taking of such census.

4. Whether the representative district lines should remain substantially as they now are or whether ultimately (i.e., after 1970) there should be redistricting in such a manner that the census tracts and representative districts can be coordinated for the statistical purposes necessary to implement the changes (if any) made in the basis of reapportionment.

It Is Therefore Ordered, Adjudged and Decreed:

1. Those provisions of Article III, Section 2 of the Constitution of the State of Hawaii fixing the number of senators per senatorial district are hereby declared unconstitutional and invalid. The remainder of Article III of said constitution is declared constitutional and valid.

2. The proviso at the end of the sixth paragraph in Section 2 of Article XV pertaining to amendments affecting representation in the Senate is hereby declared unconstitutional and invalid. The remainder of Article XV is declared constitutional and valid.

3. The plaintiffs and intervening plaintiffs have failed to prove that the apportionment of the House of Repre-

[9] *Butcher* v. *Bloom*, 203 A.2d 556, 572-73.

sentatives of the Legislature of the State of Hawaii causes any invidious discrimination in the weight of their vote or that such apportionment is the result of arbitrary or capricious action. Their prayers for relief in this respect are therefore denied.

4. This court will not interfere with the convening or conducting of the business of the Third State Legislature in regular session in 1965, save and except that the parties [fol. 389] herein are hereby enjoined from taking final action upon any legislation, except such actions as are necessary to organize the respective houses at such session and appropriate funds for the session, until legislation, pursuant to the provision of Article XV of said Constitution providing for the submission to the people of Hawaii, by special election to be held not later than August 1, 1965, the question: "Shall there be a convention to propose a revision of or amendments to the constitution?", and for any and all acts required by law to implement such legislation, has been enacted into law. Such legislation shall also provide that if the vote be in the constitutional affirmative, then a special election shall be held not later than September 15, 1965 to elect delegates to the convention in the manner provided in the Constitution. Such legislation may include legislative action under Article XV, Section 2, 4th paragraph, of the Constitution. Such legislation shall further provide that the convention convene not later than October 15, 1965 and that it conclude its deliberation in time to submit its proposed constitutional amendments to the electorate of Hawaii at a special election to be held not later than January 30, 1966, including (but not limiting the convention thereto) provisions therein for reapportioning the Senate of Hawaii on a constitutionally valid basis. Such legislation shall also appropriate and make available funds for the expenses of such elections and convention.

5. The offices of all senators of the Hawaii State Senate are hereby declared vacant as of the day of the general election of 1966. Until such date, the existing offices of all

senators elected under Article III, Section 2 of the Constitution, shall be valid.

6. This court retains jurisdiction of this action for all purposes, including but not limited to (a) considering [fol. 390] such sanctions as may be appropriate if the orders of this court are not carried out; (b) judicially reapportioning the Senate in the event that the electors of Hawaii reject a constitutional convention, or the convention fails to propose an amendment reapportioning the Senate, or the electors reject such an amendment, or if any amendment of the convention does not insure the apportionment of the Hawaii State Legislature in accordance with the requirements of the Equal Protection Clause of the 14th Amendment to the Constitution of the United States.

7. All other relief prayed for in the Complaint, Complaint in Intervention, and Cross Complaint is hereby denied.

Dated: Honolulu, Hawaii, this 17th day of February, 1965.

Gilbert H. Jertberg, Circuit Judge.
William T. Beeks, District Judge.
Martin Pence, District Judge.

[File endorsement omitted]

[fol. 393] [File endorsement omitted]

[fol. 394]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

Civil No. 2308

HENRIETTA DAVIDSON HOLT, et al., Plaintiffs,

vs.

WILLIAM S. RICHARDSON, Lieutenant Governor of Hawaii, Defendant,

JOHN J. HULTEN et al., Intervenors-Plaintiffs,

NELSON K. DOI et al. and ELMER F. CRAVALHO et al., Intervenors-Defendants.

NOTICE OF MOTION TO ALTER OR AMEND JUDGMENT —Filed March 1, 1965

To: Charles M. Tonaki and Barry J. Rubin, Suite 1021, First National Bank Bldg., Honolulu, Hawaii.

Masaji Marumoto, 235 Queen Street, Honolulu, Hawaii.

Bert T. Kobayashi, Iolani Palace Grounds, Honolulu, Hawaii.

Robert G. Dodge, Trustco Bldg., Honolulu, Hawaii.

Frank D. Padgett, Castle & Cooke Bldg., Honolulu, Hawaii.

Please take notice that the undersigned will bring the above motion to alter or amend the judgment on for hearing before this Court at the Federal Building, Honolulu,

[fol. 395] Hawaii, on the 9th day of March, 1965, at 10:00 A.M. or as soon thereafter as counsel may be heard.

Dated: Honolulu, Hawaii, March 1, 1965.

James T. Funaki, Attorney for Intervenors-Defendants, Elmer F. Cravalho et al., 400 International Savings Bldg., Honolulu, Hawaii.

Robert Kimura, Attorney for Intervenors-Defendants, Nelson K. Doi et al., Office of the Senate Majority Attorneys, Schuman Bldg., Honolulu, Hawaii.

[fol. 396]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

Civil No. 2308

[Title omitted]

MOTION TO ALTER OR AMEND JUDGMENT—Filed March 1, 1965

Intervenors-Defendants move the court to alter or amend the judgment heretofore entered in this action, by amending item 4 at the bottom of page 19 and on page 20 of the Decision and Order, and item 6 on pages 20 and 21 of the Decision and Order to read as follows:

"4. In consonance with the reapportionment plan for the Senate, set forth in Senate Concurrent Resolution No. 35, adopted by the Legislature of the State of Hawaii on March 1, 1965, the Senate shall be apportioned on the basis of the number of voters registered at the 1964 general election. Such apportionment and the redistricting plan for the Senate referred to hereinbelow shall apply to the 1966 elections and until an appropriate constitutional amendment shall have been effected.

[fol. 397] "The legislators-parties herein are hereby enjoined from taking final action upon any legislation, except such actions as are necessary to organize the respective houses at such session and appropriate funds for the session, until the State legislature in regular session in 1965:

"(a) shall have adopted a redistricting plan for the Senate on the basis of 1964 registered voters and the same shall have been approved by the court;

"(b) shall have adopted a proposed constitutional amendment embodying pertinent provisions of the foregoing reapportionment and redistricting plans, to be presented to the electorate for ratification at the 1966 general election, and the same shall have been approved by the court; and

"(c) shall have enacted legislation, pursuant to the provisions of Article XV of the State Constitution, providing for submission to the people of Hawaii at the general election of 1966 the question: 'Shall there be a convention to propose a revision of or amendments to the constitution?'.

"If the measures set forth in paragraphs (a), (b), and (c) above shall not have been adopted by the legislature on or before the twentieth calendar day following the date of the order granting the motion to amend the said Decision and Order, and the same thereafter shall not have been approved by the court, then item 4 on pages 19 and 20 and item 6 on pages 20 and 21 of the Decision and Order dated February 17, 1965, shall be reinstated and remain in full force and effect as if the motion to amend the same had not been granted.

[fol. 398] "• • •

"6. This court retains jurisdiction of this action for all purposes including but not limited to:

"(a) considering such actions as may be appropriate if the orders of this court are carried out; and

"(b) judicially prescribing a reapportionment or redistricting plan for the Senate whenever appropriate."

This motion is based on the Statement of Reasons and Authorities, which is attached hereto, and Senate Concurrent Resolution No. 35 of the Third Legislature of the State of Hawaii, General Session of 1965, adopted on March 1, 1965.

Dated: Honolulu, Hawaii, March 1, 1965.

James T. Funaki, Attorney for Intervenors-Defendants, Elmer F. Cravalho et al., 400 International Savings Bldg., Honolulu, Hawaii.

Robert Kimura, Attorney for Intervenors-Defendants, Nelson K. Doi et al., Office of the Senate Majority Attorneys, Schuman Bldg., Honolulu, Hawaii.

[fol. 399]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

Civil No. 2308

[Title omitted]

STATEMENT OF REASONS AND AUTHORITIES—Filed March 1, 1965

This motion is brought in accordance with Rule 59(e) of the Federal Rules of Civil Procedure, which provides:

"Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment."

On February 17, 1965, this Court "ordered, adjudged and decreed," among other things, that the legislature provide for (1) a special election at which the question: "Shall

there be a convention to propose a revision of or amendments to the constitution?" shall be submitted to the people; (2) a special election to elect delegates to a constitutional convention; (3) convening of the constitutional convention; and (4) a special election for ratification of amendments proposed by the convention.

The motion to alter or amend is made for the following reasons:

[fol. 400] (1) As indicated at the hearing before this Court, the three special elections will cost nearly half a million dollars. It is estimated by the Department of Budget and Finance, State of Hawaii, that the total cost of the constitutional convention and of the three special elections will be in excess of one million dollars.

(2) The holding of three special elections and a convention in a period of six months will be unduly cumbersome.

(3) The convention will not be limited to consideration of amendments to senatorial reapportionment and might be diverted from its primary task.

(4) Under Article XV, section 2, of the State Constitution, the Lieutenant Governor is mandated to submit to the people at the 1970 general election the question of whether a convention to amend or revise the constitution shall be held. Such a convention is intended to and would have the time and facilities to consider the entire constitution and any amendments or revisions thereof.

As indicated in Senate Concurrent Resolution No. 35, it is contemplated that the question of whether a constitutional convention is to be held will be submitted to the people at the 1966 general election.

(5) The end sought to be achieved is a proper apportionment of the Senate on the basis of registered voters. The cost of a constitutional convention is grossly disproportionate to the end sought which can be equitably,

[fol. 401]

speedily and economically achieved by the amendment prayed for.

Dated: Honolulu, Hawaii, March 1, 1965.

Respectfully submitted,

James T. Funaki, Attorney for Intervenors-Defendants, Elmer F. Cravalho et al., 400 International Savings Bldg., Honolulu, Hawaii.

Robert Kimura, Attorney for Intervenors-Defendants, Nelson K. Doi et al., Office of the Senate Majority Attorneys, Schuman Bldg., Honolulu, Hawaii.

[fol. 410] [File endorsement omitted]

[fol. 411]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

Civil No. 2308

[Title omitted]

MOTION TO AMEND MOTION TO ALTER OR AMEND JUDGMENT AND ORDER THEREON—March 5, 1965

Intervenors-Defendants move the Court to amend their Motion to Alter or Amend Judgment filed herein on March 1, 1965, by inserting the word "not" between the words "are carried" on the second line of the quoted subparagraph 6(a) on page 3 of said Motion.

This Motion is to correct an inadvertent typographical omission.

[fol. 412] Dated: Honolulu, Hawaii, March 5, 1965.

James T. Funaki, Attorney for Intervenors-Defendants, Elmer F. Cravalho, et al., 400 International Savings Bldg., Honolulu, Hawaii.

Robert Kimura, Attorney for Intervenors-Defendants, Nelson K. Doi, et al., Office of the Senate Majority Attorneys, Schuman Bldg., Honolulu, Hawaii.

ORDER

The foregoing Motion to Amend Motion to Alter or Amend Judgment is approved and allowed.

Martin Pence, Judge of the above entitled Court.

[fol. 454]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

Civil No. 2308

[Title omitted]

FINAL ORDER ON MOTION TO ALTER OR AMEND JUDGMENT—March 9, 1965

As stated in this court's Decision and Order of February 17, 1965, a plan reapportioning the Senate of Hawaii must be operative for the 1966 general election, and this court did not in February and does not now wish to assume the task of devising a reapportionment scheme. Faced with the legislature's failure to act during its special reapportionment session of 1964, this court then felt compelled to channel reapportionment measures into the constitutional convention route.

Based upon the current actions of the legislators, followed by the representations by counsel for all parties to this suit that all are in accord with the objectives outlined in the motion to alter or amend judgment, this court is now convinced that the legislative climate has changed and that the legislators presently in session are now prepared to undertake the formulation of a plan for reapportioning the Senate which can be Constitutionally justified. From the

representations made, this court is satisfied that the multi-
[fol. 455] ple and accelerated special elections and a constitutional convention would cost well over $1,000,000, strain the State's election machinery, and force an as-yet-unsought-for constitutional convention upon the people of Hawaii, with attendant loss of time to the delegates.

This court is therefore prepared to grant the motion of intervenor-defendants Nelson K. Doi et al., and Elmer F. Cravalho et al., to alter the court's Decision and Order of February 17, 1965.

It Is Therefore Ordered, Adjudged and Decreed that this court's order of February 17, 1965 be and is hereby altered in the following particulars. Item 4 beginning at the bottom of page 19, and item 6 beginning at the bottom of page 20, are amended to read as follows:

"4. The Senate shall be apportioned on the basis of the number of voters registered at the 1964 general election substantially in the manner outlined by the reapportionment plan for the Senate, set forth in Senate Concurrent Resolution No. 35, adopted by the Legislature of the State of Hawaii on March 1, 1965, and attached to the Motion to Alter or Amend Judgment filed in this court on March 1, 1965. Any such reapportionment plan shall apply to the 1966 elections and thereafter until an appropriate and legal constitutional amendment shall become effective.

"In furtherance of the above, the legislators and parties herein are enjoined from taking final action upon any legislation, except such actions as are necessary to organize the respective houses at such session and appropriate funds for the session, until the State legislature in regular session in 1965:

"(a) shall have enacted a reapportionment and redistricting plan for the Senate on the basis of 1964 registered voters (and applicable to the 1966 elections) and the same shall have become law;

[fol. 456] "(b) shall have adopted a proposed constitutional amendment embodying pertinent provisions of

the foregoing reapportionment and redistricting plan, to be presented to the electorate for ratification at the 1966 general election, in the manner provided by Article XV, Section 3, of the State Constitution; and

"(c) shall have enacted legislation, pursuant to the provisions of Article XV of the State Constitution, providing for submission to the people of Hawaii at the general election of 1966 the question: 'Shall there be a convention to propose a revision of or amendments to the Constitution?'."

"After (a), (b) and (c) shall have been enacted and adopted, and made operative, the same shall thereupon be submitted to this court for approval.

"If the measures set forth in paragraphs (a), (b) and (c) above shall not have been enacted and adopted by the legislature on or before the twentieth calendar day following the date of the order granting the motion to amend the said Decision and Order, and made operative, and if the same after hearing shall not have been approved by the court, then, as far as then and thereafter applicable, item 4 on pages 19 and 20 and item 6 on pages 20 and 21 of the Decision and Order dated February 17, 1965 shall become automatically reinstated and thereafter remain in full force and effect as if the Motion to Amend the same had not been granted.

* * * * * * *

"6. This court retains jurisdiction of this action for all purposes, including but not limited to:

"(a) considering such sanctions as may be appropriate if the orders of this court are not carried out; and

"(b) judicially reapportioning and redistricting the [fol. 457] Senate, in the event that the obligations of the parties above indicated are not fulfilled, or any reapportionment plan so enacted is not approved by the

court, or the electors of Hawaii at the 1966 general election reject the proposed and court-approved constitutional amendment reapportioning the Senate, or under any other circumstances which this court shall deem appropriate."

In all other respects this court's Decision and Order of February 17, 1965 is reaffirmed.

Dated: Honolulu, Hawaii, this 9th day of March, 1965.

Gilbert H. Jertberg, Circuit Judge, William T. Beeks, District Judge, Martin Pence, District Judge.

[fol. 479] [File endorsement omitted]

[fol. 480]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

Civil No. 2308

[Title omitted]

MEMORANDUM OF GOVERNOR'S POSITION ON SENATE REAPPORTIONMENT UNDER HOUSE BILL NO. 773, SENATE DRAFT 1—Filed March 24, 1965

1. The division of the neighbor islands into one- or two-member senatorial districts and of Oahu into a nine-member district and a ten-member district is arbitrary and capricious, unfairly weights the voting and representation in favor of Oahu voters and so is invidiously discriminatory and violative of the equal protection clause in the Fourteenth Amendment.

H.B. 773, S.D. 1, proposes an amendment to the Hawaii State Constitution that would apportion the State Senate as follows:

First senatorial district—Puna, Hilo, and Hamakua in the County of Hawaii:	2
Second senatorial district—Kau, Kona, and Kohala in the County of Hawaii:	1
Third senatorial district—County of Maui:	2
Fourth senatorial district—part of the City and County of Honolulu:	9
Fifth senatorial district—remainder of the City and County of Honolulu:	10
Sixth senatorial district—County of Kauai:	1
	25

[fol. 481] We respectfully submit that such apportionment violates the equal protection clause of the Fourteenth Amendment to the United States Constitution.

We are aware that courts have "recognized that legislative reapportionment is primarily a matter for legislative concern and determination" (*Reynolds* v. *Sims,* 377 U.S. 533, 586), and traditionally have observed restraint in passing judgment thereon. However, where a legislative apportionment scheme is invidiously discriminatory, the courts, at least since 1962, have not hesitated to provide relief. *Baker* v. *Carr,* 369 U.S. 186; *Reynolds* v. *Sims,* 377 U.S. 533; *WMCA, Inc.* v. *Lomenzo,* 377 U.S. 633; *Maryland Committee* v. *Tawes,* 377 U.S. 656; *Davis* v. *Mann,* 377 U.S. 678; *Roman* v. *Sincock,* 377 U.S. 695; *Lucas* v. *Colorado General Assembly,* 377 U.S. 713.

As stated in *Baker* v. *Carr,* 369 U.S. 186, 226:

> "Judicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects *no* policy, but simply arbitrary and capricious action." (Emphasis in text.)

On the application of the concept of equal protection to legislative apportionment and representation, the United

States Supreme Court in *Reynolds* v. *Sims* has stated the following principles:

> ". . . [T]he concept of equal protection has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged. With respect to the allocation of legislative representation, all voters, as citizens of a State, stand in the same relation regardless of where they live. Any suggested criteria for the differentiation of citizens are insufficient to justify any discrimination, as to the weight of their votes, unless relevant to the permissible purposes of legislative apportionment. Since the achieving of fair and effective representation for all citizens is [fol. 482] concededly the basic aim of legislative apportionment, we conclude that the Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legislators. Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race, *Brown* v. *Board of Education,* 347 U.S. 483, or economic status, *Griffin* v. *Illinois,* 351 U.S. 12, *Douglas* v. *California,* 372 U.S. 353. . . ." 377 U.S. at 565-566.

Specifically, in *Reynolds* v. *Sims,* 377 U.S. 533, the court has indicated some guidelines relating to size of legislative districts:

> "By holding that as a federal constitutional requisite both houses of a state legislature must be apportioned on a population basis, we mean that *the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable.* We realize that it is a practical impossi-

bility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters. Mathematical exactness or precision is hardly a workable constitutional requirement." *Id.* at 577.

"... Single-member districts may be the rule in one State, while another State might desire to achieve some flexibility by creating multimember or floterial districts. *Whatever the means of accomplishment, the overriding objective must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State.*" *Id.* at 579. (Emphasis added.)

It is true that in *Reynolds,* the court was concerned primarily with discrimination resulting from apportionment that was not based on population. However, the principles enunciated in that case, we submit, are also applicable to discrimination resulting from arbitrary districting.

The Supreme Court of Pennsylvania in *Butcher* v. *Bloom,* 203 A.2d 556, even while holding that a mixture of single-member districts with two-, three-, or four-member districts (but with no district that was so overwhelmingly large that [fol. 483] it dominated a house) was not per se unconstitutional, stated:

"While we do not believe that the creation of multi-member districts of itself, would violate the Federal Constitution simply because the voters in a particular district (where justified by population) would vote for two or more representatives while those in another district would vote for a lesser number, *we do believe that a legislative scheme which creates single-member districts and multi-member districts in an arbitrary manner would be objectionable.* We would agree with the district court, however, that in the absence of any reasonable justification (historical or otherwise), such districting might be the result of gerrymandering for

partisan advantage and, in that event, would be arbitrary and capricious. . . ." *Id.* at 572-573. (Emphasis added.)[1]

Each voter, no matter where he lives, stands as a citizen and voter in the same relation to any other voter in the State. Each is entitled to "fair and effective" representation and has the right to equal participation in the election of legislators.

There is no rational justification for the difference in treatment of voters in the counties of Hawaii, Maui and Kauai vis-a-vis voters on Oahu.

There is no rhyme or reason for districting the neighbor island counties into one- and two-member senatorial districts and the City and County of Honolulu into a nine-member and a ten-member senatorial district; it goes far beyond any reasonably acceptable norm. Such districting is arbitrary and capricious; such overwhelming and disproportionate size of the two Oahu districts unfairly weights the votes and representation of Oahu voters and denies fair and effective representation to voters in the neighbor island senatorial districts.

[fol. 484] Apportionment that is not based on population is not the only means by which invidious discrimination may take place. Invidious discrimination can also result from arbitrary and unreasonable districting, even if the apportionment is in proportion to population.

Under the proposed plan, the voters in the ten-senator district would vote for and elect not two, three or four, but ten senators who would be looking after their interests and who would constitute 40 percent of the Senate. With only three additional votes, the delegation from the fifth senatorial district could control the Senate. So could the fourth senatorial district delegation with four additional votes.

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[1]The United States Supreme Court referred to the *Butcher* case with apparent approval in *Scranton* v. *Drew*, decided on November 16, 1964, 33 LW 3181.

The concentration of voting strength in either of these districts would overwhelm the smaller districts.

Contrast the weight of the vote of a voter in such a large district with that of a voter in a one- or two-senator district. The weight of a vote in a one- or two-senator district in contrast would yield such meager representation and would be so diluted that a voter in such a district may, not without reason, decide that it is not worth his while to go to the polls. By no stretch of the imagination can it be said that he enjoys "equal participation . . . in the election of state legislators" (*Reynolds* v. *Sims, id.* at 566), with voters in the fourth and fifth senatorial districts, or "fair and effective" representation. (*Id.* at 565.)

The lopsided districting in H.B. 773 cannot be justified on any historic, geographic or other basis. The fact that Hawaii has had a similar type of senatorial districting under the Organic Act and under the State Constitution offers no justification. Such districting was based on circumstances not analogous to those in the present case. [fol. 485] The senatorial apportionment under the Organic Act just prior to statehood, as well as under the State Constitution, was based on geographic representation, not population representation, and the number of senators from each senatorial district was fairly even.[2]

Districting based on geographic representation (which basis of representation has been held to be unconstitutional), is not a valid justification for apportionment based on population, when it results in lopsided district representation, as in the instant situation.

The fact that the counties are separated by ocean waters is not a valid consideration here.

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[2] Article III, section 2, of the State Constitution provides for the following:

First senatorial district (Hawaii), five senators;
Second senatorial district (Hawaii), two senators;
Third senatorial district (Maui), five senators;
Fourth senatorial district (Oahu), five senators;
Sixth senatorial district (Kauai), three senators.

Furthermore, there is nothing to indicate that division of Oahu into smaller senatorial districts is not practicable.

The subject plan unfairly weights the votes of voters living in the fourth and fifth senatorial districts and unjustifiably dilutes the votes and the representation of voters living in the four other senatorial districts by means of a districting scheme that is arbitrary and capricious. Accordingly, it violates the equal protection clause of the Fourteenth Amendment.

[fol. 486]

2. Within a disproportionately large district, equal protection is denied by submergence of minority groups by a lack of identifiable constituencies, by an unreasonably long ballot and the likelihood of election of legislators by substantially less than a majority of the votes cast in the district.

It is a basic principle in a representative democracy that the people elect persons to represent them, to speak in their stead and to make the laws by which they are to live. This assumes that each legislator will have an identifiable constituency, and presupposes that the legislators will be elected by a majority of the people within each district. In a district as large as the fourth or fifth senatorial district, this basic principle is grossly subverted.

Within both of the oversize districts, we find all of the shortcomings of the Colorado plan that the United States Supreme Court criticized in *Lucas* v. *Colorado General Assembly,* 377 U.S. 713, 731:

> ". . . One of the most undesirable features of the existing apportionment scheme was the requirement that, in counties given more than one seat in either or both of the houses of the General Assembly, all legislators must be elected at large from the county as a whole. Thus, under the existing plan, each Denver voter was required to vote for eight senators and 17 representatives. Ballots were long and cumbersome,

> and an intelligent choice among candidates for seats in the legislature was made quite difficult. No identifiable constituencies *within* the populous counties resulted, and the residents of those areas had no single member of the Senate or House elected specifically to represent them. Rather, each legislator elected from a multimember county represented the county as a whole."[3] (Emphasis in text.)

[fol. 487] A voter living in the fifth senatorial district and tenth representative district would be required to vote for ten senators, four representatives, seven city councilmen, not to mention the board of education, the school advisory council and other elected officers.

The ballot would be long and cumbersome and it would be difficult for him to know the qualifications of the candidates and to vote intelligently. He may be forced to vote for candidates whom he does not know well enough or vote a short ballot for those candidates whom he does know. The problem would be multiplied in the primary elections because there is no limitation on the number of candidates running for nomination.

Moreover, in a single-member district with two candidates running, one must obtain a majority of the votes to win. Mathematically, the larger the number of candidates and/or the number of seats to be filled on a district-wide basis (compounded by short-ballot voting), the greater the likelihood that legislators may be elected with less than a majority of the votes cast, and often substantially less than a majority.

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[3] The court's footnote that "We do not intimate that apportionment schemes which provide for the at-large election of a number of legislators from a county, or any political subdivision, are constitutionally defective. . . ." does not mean, we submit, that any election at large on a county or sub-county basis regardless of the relative size of the districts would be constitutionally valid.

We note that in the Colorado plan, the City and County of Denver was apportioned *8 out of 35* Senate seats, and *17 out of 65* House seats. 377 U.S. at 724. It does not exhibit the type of lopsided districting here in question.

In a ten-member district covering a large area, a well-organized group could dominate the outcome of the election to the exclusion and submergence of ethnic, political or economic minority groups that could have obtained representation if the districts were smaller.

In this instance, a voter in a relatively sparsely populated section in the fifth senatorial district, such as the Waianae section, might properly complain that his vote is being submerged by the concentrated vote of those living in the more urban areas of the district. With smaller dis-
[fol. 488] tricts he would have had a better chance of being represented by persons of his choosing. The State would be losing the diversity of points of view that contribute to viable state government.

The plan in issue violates the equal protection clause in that it denies fair and effective representation of elements within the disproportionately large districts.

[fol. 489]

3. *Fortson* v. *Dorsey* is clearly distinguishable and not directly pertinent here.

Fortson v. *Dorsey,* —— U.S. ——, 33 L.W. 4143, decided by the United States Supreme Court on January 18, 1965, is clearly distinguishable. The Georgia Senate there in question consisted of 54 senatorial districts, each of them substantially equal in population. Thirty-three of these were single-member districts. The remaining 21 districts were allotted in groups consisting of from two to seven senatorial districts among the seven most populous counties.

The largest such group—Fulton County—consisted of seven senators out of 54, a far cry from the ten out of 25 or nine out of 25 in the instant case. Moreover, the Georgia plan required that, though the senatorial districts in the larger counties were consolidated and elections were held county-wide, the candidates had to come from the respective senatorial districts. This tended to assure that the individual senatorial districts within a county would not be submerged.

Furthermore, the primary contention was not that a person in a single-member district is unwarrantedly discriminated against, as compared to a person in an oversize multi-member district, as it is in the case at bar. Rather, the reverse contention was made—that a voter in a multi-district county having county-wide elections is at a disadvantage compared to a voter in a single district constituency because such county-wide voting could result in the nullifica-
[fol. 490] tion of the unanimous choice of the voters of a district, thereby thrusting upon them a senator for whom no one in the district had voted.

Finally, the court's holding was that it could not say that the multi-member constituency feature of the Georgia scheme was per se unconstitutional, without any showing that it would operate to minimize or cancel out the voting strength of any element in the voting population.

In contrast, in the case at bar there is ample showing that the districting plan is arbitrary and unreasonably discriminatory, and dilutes the voting strength and representation of persons in the one- and two-member districts.

[fol. 491]

4. Conclusion and Recommendations.

For the foregoing reasons, we submit that the districting plan in H. B. 773, S. D. 1, violates the equal protection clause of the Fourteenth Amendment.

We recommend that the court therefore declare that such redistricting plan is not acceptable, and return to the legislature:

(a) H.B. 987, S.D. 1 (providing for provisional reapportionment of the Senate), for the Senate to reconsider its third reading of the bill, appropriately amend the provisions for districting on Oahu, with concurrence of the House of Representatives, and repass it on third reading, and after the same becomes law, to submit it to the court for approval.

(b) H.B. 773, S.D. 1 (providing for constitutional amendment), for the Senate to appropriately amend the provi-

sions for districting on Oahu, and to submit it to the court for approval.

Relative to H.B. 773, we recommend that the twenty-day period ending March 29, 1965, within which the court has required that the legislation be enacted, be extended for a period long enough to permit adoption of a constitutional amendment. In this connection it is to be noted that the State Constitution provides that for adoption by the legislature at one session, a constitutional amendment must pass by a two-thirds vote of each house after either or both houses have given the governor ten days' written notice of the final form of the proposed amendment (Article XV, section 3).

If the legislature fails to adopt and submit a valid provisional plan within the time prescribed, we recommend that [fol. 492] the court adopt as a provisional plan one of the districting plans for Oahu that are being considered by the legislature or any other plan that it finds to be valid. Such plan would remain in effect until a valid constitutional amendment is effected.

If the legislature fails to adopt a proper constitutional amendment, we recommend that pursuant to H.B. 986, the question, "Shall there be a convention to propose a revision of or amendments to the Constitution?" be submitted to the people at the 1966 general election, and that attempts at constitutional amendment by legislation be abandoned.

Dated: Honolulu, Hawaii, March 24, 1965.

Respectfully submitted,

Bert T. Kobayashi, Attorney General, State of Hawaii

[fol. 530] [File endorsement omitted]

[fol. 531]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

Civil No. 2308

[Title omitted]

ADDENDUM TO GOVERNOR'S MEMORANDUM—
Filed March 25, 1965

Because of limitations of time we did not include in our memorandum filed yesterday, certain information in further support thereof, and with the court's indulgence, submit the following information at this time:

The composition, place of residence, profession, ethnic background, and political party affiliation of the incumbent senators from the fourth and fifth senatorial districts are as follows:

Fourth Senatorial District

Senators	Residence Rep. Dist.	Profession	Race	Party*
O. Vincent Esposito	15th	Attorney	Caucasian	D
Yasutaka Fukushima	15th	Attorney	Japanese	R
Anna F. Kahanamoku	17th	Business-woman	Part-Hawaiian	D
D. Hebden Porteus	15th	Attorney	Caucasian	R
Vincent H. Yano	16th	Attorney	Japanese	D

* D—Democratic; R—Republican.

[fol. 532]

*Fifth Senatorial District**

Senators	Residence Rep. Dist.	Profession	Race	Party*
George R. Ariyoshi	12th	Attorney	Japanese	D
John J. Hulten	8th	Business-man	Caucasian	D
Mitsuyuki Kido	10th	Business-man	Japanese	D
Sakae Takahashi	12th	Attorney	Japanese	D

Dated: Honolulu, Hawaii, March 25, 1965.

Respectfully submitted,

Bert T. Kobayashi, Attorney General, State of Hawaii.

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* Senator Patsy T. Mink and her successor, Senator Taylor A. Pryor, are not included.

[fol. 536] [File endorsement omitted]

[fol. 537]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

Civil No. 2308

[Title omitted]

SUBMISSION OF PROPOSED CONSTITUTIONAL AMENDMENTS ADOPTED AND LEGISLATION ENACTED PURSUANT TO MINUTE ORDER DATED MARCH 9, 1965, AS AMENDED—Filed April 14, 1965

Come now Intervenors-Defendants Elmer F. Cravalho et al and Intervenors-Defendants Nelson K. Doi et al, in pursuance of the Minute Order dated March 9, 1965, as amended, of this Court, and submit herewith the following:

1. H. B. No. 987, S. D. 1, C. D. 1, being a reapportionment and redistricting plan for the Senate on the basis of

1964 registered voters (and applicable to the 1966 elections), together with the conference committee reports therefor, attached hereto as Exhibit "A" and made a part hereof; and

[fol. 538] 2. H. B. No. 773, S. D. 1, C. D. 1, being a proposed constitutional amendment embodying pertinent provisions of the reapportionment and redistricting plans as set forth in H. B. No. 987, S. D. 1, C. D. 1, to be presented to the electorate for ratification at the 1966 general election, together with the conference committee reports therefor, attached hereto as Exhibit "B" and made a part hereof; and

3. H. B. No. 986, being legislation pursuant to the provisions of Article XV of the State Constitution, providing for submission to the people of Hawaii at the general election of 1966 the question: "Shall there be a convention to propose a revision of or amendments to the constitution?", attached hereto as Exhibit "C" and made a part hereof.

The reason and justification for the reapportionment and redistricting plan for the Senate as set forth in H. B. No. 987, S. D. 1, C. D. 1, and H. B. No. 773, S. D. 1, C. D. 1, are covered in the conference committee reports attached thereto.

Intervenors-Defendants herein further submit certificates, attached to the abovementioned bills, issued by the President of the Senate and the Speaker of the House of Representatives and the clerks of the Senate and the House respectively, certifying that the said bills have been duly adopted and enacted.

[fol. 539] Dated: Honolulu, Hawaii, April 14, 1965.

James T. Funaki, Attorney for Intervenors-Defendants, Elmer F. Cravalho et al, Office of the House Majority Attorneys, Schuman Building, Honolulu, Hawaii.

Robert Kimura, Attorney for Intervenors-Defendants, Nelson K. Doi et al, Office of the Senate Majority Attorneys, Schuman Building, Honolulu, Hawaii.

[fol. 540]

EXHIBIT "A"

CONF. COM. REP. NO. 2

Honolulu, Hawaii
April 13, 1965

Re: H. B. No. 987
S. D. 1

The Honorable Kazuhisa Abe
President of the Senate
Third Legislature
General Session, 1965
State of Hawaii

Sir:

Your Conference Committee to which was referred H. B. No. 987, S. D. 1 entitled: "A BILL FOR AN ACT PROVIDING FOR THE PROVISIONAL REAPPORTIONMENT OF THE SENATE OF THE STATE OF HAWAII", begs leave to report as follows:

The purpose of this bill is to provide for a provisional reapportionment of the State Senate in conformity with the March 9, 1965, minute order of the United States District Court for the District of Hawaii in *Holt* vs. *Richardson*, et al., Civil No. 2308. This bill, if enacted into law, will be effective for the 1966 general elections and will remain in effect until superseded by a constitutional amendment.

Your Committee upon consideration of this bill has amended Section 1 thereof to read as follows:

"SECTION 1. Article III, Section 2 of the Constitution of the State of Hawaii shall be amended to read as follows:

'Senate; Districts; Composition

Section 2. The Senate shall be composed of twenty-five members, who shall be elected by the qualified

voters of the respective senatorial districts. Until the next reapportionment, the senatorial districts, and the number of senators to be elected from each, shall be as follows:

First senatorial district: the island of Hawaii, three;

Second senatorial district: the islands of Maui, Molokai, Lanai and Kahoolawe, two;

[fol. 541] Third senatorial district: that portion of the island of Oahu consisting of the eighth representative district as described in the Schedule, Article XVI, Section 1, of the Constitution of the State of Hawaii, as amended, three;

Fourth senatorial district: that portion of the island of Oahu consisting of the ninth and tenth representative districts as described in the said Schedule and the first and the eighth precincts of the eleventh representative district as described in the governor's proclamation issued September 11, 1964, for the 1964 general election, four;

Fifth senatorial district: that portion of the island of Oahu consisting of the twelfth and thirteenth representative districts as described in the said Schedule and the second through seventh precincts, inclusive, and the ninth through twelfth precincts, inclusive, of the eleventh representative district, and the first through fifth precincts, inclusive, and the eighth, eleventh, fifteenth and sixteenth precincts of the fourteenth representative district as described in the said proclamation, four;

Sixth senatorial district: that portion of the island of Oahu consisting of the fifteenth representative district as described in the said Schedule and the sixth, seventh, ninth and tenth precincts and the twelfth through fourteenth precincts, inclusive of the fourteenth representative district as described in the said proclamation, four;

Seventh senatorial district: that portion of the island of Oahu consisting of the sixteenth and seventeenth representative districts as described in the said Schedule, four;

Eighth senatorial district: the islands of Kauai and Niihau, one.' "

With respect to other portions of the bill, your Committee feels that no amendments are necessary.

This bill was considered concurrently with H. B. No. 773, S. D. 1 inasmuch as the districting plan intended in H. B. No. 773, S. D. 1, C. D. 1 is intended to be the same as the districting plan set forth in this bill as amended herein. [fol. 542] The findings and conclusions for the districting plan are fully set forth in the Conference Committee Report covering H. B. No. 773, S. D. 1, C. D. 1, and are adopted and incorporated herein by reference.

Your Committee is in accord with the purpose and intent of H. B. No. 987, S. D. 1, as amended herein, and recommends its passage on final reading in the form attached hereto as H. B. No. 987, S. D. 1, C. D. 1.

Respectfully submitted,

MANAGERS ON THE PART OF THE SENATE

/s/ Sakae Takahashi
Sakae Takahashi, Chairman

/s/ O. Vincent Esposito W/R
O. Vincent Esposito, Vice Chrm.

/s/ Yasutaka Fukushima (A/A)
Yasutaka Fukushima, Member

/s/ Mitsuyuki Kido
Mitsuyuki Kido, Member

/s/ Noboru Miyake (WR)
Noboru Miyake, Member

/s/ JOHN T. USHIJIMA
JOHN T. USHIJIMA, Member

/s/ NADAO YOSHINAGA
NADAO YOSHINAGA, Member

MANAGERS ON THE PART OF THE HOUSE

/s/ JAMES H. WAKATSUKI
JAMES H. WAKATSUKI, Chairman

/s/ TADAO BEPPU
TADAO BEPPU, Vice Chrm.

/s/ JAMES K. CLARK
JAMES K. CLARK, Member

/s/ GEORGE W. T. LOO,
GEORGE W. T. LOO, Member

/s/ BARNEY B. MENOR
BARNEY B. MENOR, Member

/s/ KATSUGO MIHO
KATSUGO MIHO, Member

/s/ GEORGE M. OKANO
GEORGE M. OKANO, Member

/s/ ROBERT C. OSHIRO
ROBERT C. OSHIRO, Member

/s/ FREDERICK W. ROHLFING W.R.
FREDERICK W. ROHLFING, Member

/s/ RUDOLPH PACARRO
RUDOLPH PACARRO, Member

[fol. 543]

CONF. COM. REP. NO. 2

Honolulu, Hawaii
April 12, 1965

Re: H. B. No. 987
S. D. 1
C. D. 1

The Honorable Elmer F. Cravalho
Speaker, House of Representatives
Third Legislature
General Session, 1965
State of Hawaii

Sir:

Your Conference Committee to which was referred H. B. No. 987, S. D. 1 entitled: "A BILL FOR AN ACT PROVIDING FOR THE PROVISIONAL REAPPORTIONMENT OF THE SENATE OF THE STATE OF HAWAII", begs leave to report as follows:

The purpose of this bill is to provide for a provisional reapportionment of the State Senate in conformity with the March 9, 1965, minute order of the United States District Court for the District of Hawaii in *Holt* vs. *Richardson,* et al., Civil No. 2308. This bill, if enacted into law, will be effective for the 1966 general elections and will remain in effect until superseded by a constitutional amendment.

Your Committee upon consideration of this bill has amended Section 1 thereof to read as follows:

"SECTION 1. Article III, Section 2 of the Constitution of the State of Hawaii shall be amended to read as follows:

'Senate; Districts; Composition

Section 2. The Senate shall be composed of twenty-five members, who shall be elected by the qualified voters of the respective senatorial districts, and the

number of senators to be elected from each, shall be as follows:

First senatorial district: the island of Hawaii, three;

Second senatorial district: the islands of Maui, Molokai, Lanai and Kahoolawe, two;

[fol. 544] Third senatorial district: that portion of the island of Oahu consisting of the eighth representative district as described in the Schedule, Article XVI, Section 1, of the Constitution of the State of Hawaii, as amended, three;

Fourth senatorial district: that portion of the island of Oahu consisting of the ninth and tenth representative districts as described in the said Schedule and the first and the eighth precincts of the eleventh representative district as described in the governor's proclamation issued September 11, 1964, for the 1964 general election, four;

Fifth senatorial district: that portion of the island of Oahu consisting of the twelfth and thirteenth representative districts as described in the said Schedule and the second through seventh precincts, inclusive, and the ninth through twelfth precincts, inclusive, of the eleventh representative district, and the first through fifth precincts, inclusive, and the eighth, eleventh, fifteenth and sixteenth precincts of the fourteenth representative district as described in the said proclamation, four;

Sixth senatorial district: that portion of the island of Oahu consisting of the fifteenth representative district as described in the said Schedule and the sixth, seventh, ninth and tenth precincts and the twelfth through fourteenth precincts, inclusive of the fourteenth representative district as described in the said proclamation, four;

Seventh senatorial district: that portion of the island of Oahu consisting of the sixteenth and seventeenth

representative districts as described in the said Schedule, four;

Eighth senatorial district: the islands of Kauai and Niihau, one.' "

With respect to other portions of the bill, your Committee feels that no amendments are necessary.

This bill was considered concurrently with H. B. No. 773, S. D. 1 inasmuch as the districting plan intended in H. B. No. 773, S. D. 1, C. D. 1 is intended to be the same as the districting plan set forth in this bill as amended herein. [fol. 545] The findings and conclusions for the districting plan are fully set forth in the Conference Committee Report covering H. B. No. 773, S. D. 1, C. D. 1, and are adopted and incorporated herein by reference.

Your Committee is in accord with the purpose and intent of H. B. No. 987, S. D. 1, as amended herein, and recommends its passage on final reading in the form attached hereto as H. B. No. 987, S. D. 1, C. D. 1.

Respectfully submitted,

MANAGERS ON THE PART OF THE SENATE

/s/ SAKAE TAKAHASHI
SAKAE TAKAHASHI, Chairman

/s/ O. VINCENT ESPOSITO W/R
O. VINCENT ESPOSITO, Vice-Chrm.

/s/ YASUTAKA FUKUSHIMA (W/R)
YASUTAKA FUKUSHIMA, Member

/s/ MITSUYUKI KIDO
MITSUYUKI KIDO, Member

/s/ NOBORU MIYAKE (WR)
NOBORU MIYAKE, Member

/s/ JOHN T. USHIJIMA
JOHN T. USHIJIMA, Member

/s/ NADAO YOSHINAGA
NADAO YOSHINAGA, Member

MANAGERS ON THE PART OF THE HOUSE

/s/ JAMES H. WAKATSUKI
JAMES H. WAKATSUKI, Chairman

/s/ TADAO BEPPU
TADAO BEPPU, Vice-Chrm.

/s/ JAMES K. CLARK
JAMES K. CLARK, Member

/s/ GEORGE W. T. LOO (W.R.)
GEORGE W. T. LOO, Member

/s/ BARNEY B. MENOR
BARNEY B. MENOR, Member

/s/ KATSUGO MIHO
KATSUGO MIHO, Member

/s/ GEORGE M. OKANO
GEORGE M. OKANO, Member

/s/ ROBERT C. OSHIRO
ROBERT C. OSHIRO, Member

/s/ FREDERICK W. ROHLFING W.R.
FREDERICK W. ROHLFING, Member

/s/ RUDOLPH PACARRO
RUDOLPH PACARRO, Member

[fol. 546]

(To be made one and eight copies)

THIRD LEGISLATURE, 1965
STATE OF HAWAII

H.B. NO. 987
S. D. 1
C. D. 1

A BILL FOR AN ACT

PROVIDING FOR THE PROVISIONAL REAPPORTIONMENT OF THE SENATE OF THE STATE OF HAWAII.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

SECTION 1. *Senate; Districts; Composition.* The Senate shall be composed of twenty-five members, who shall be elected by the qualified voters of the respective senatorial districts. Until the next reapportionment, the senatorial districts, and the number of senators to be elected from each, shall be as follows:

"Senate; Districts; Composition

Section 2. The Senate shall be composed of twenty-five members, who shall be elected by the qualified voters of the respective senatorial districts. Until the next reapportionment, the senatorial districts, and the number of senators to be elected from each, shall be as follows:

First senatorial district: the island of Hawaii, three;

Second senatorial district: the islands of Maui, Molokai, Lanai and Kahoolawe, two;

Third senatorial district: that portion of the island of Oahu consisting of the eighth representative district

as described in the Schedule, Article XVI, Section 1, of the Constitution of the State of Hawaii, as amended, three;

Fourth senatorial district: that portion of the island [fol. 547] of Oahu consisting of the ninth and tenth representative districts as described in the said Schedule and the first and the eighth precincts of the eleventh representative district as described in the governor's proclamation issued September 11, 1964, for the 1964 general election, four;

Fifth senatorial district: that portion of the island of Oahu consisting of the twelfth and thirteenth representative districts as described in the said Schedule and the second through seventh precincts, inclusive, and the ninth through twelfth precincts, inclusive, of the eleventh representative district, and the first through fifth precincts, inclusive, and the eighth, eleventh, fifteenth and sixteenth precincts of the fourteenth representative district as described in the said proclamation, four;

Sixth senatorial district: that portion of the island of Oahu consisting of the fifteenth representative district as described in the said Schedule and the sixth, seventh, ninth and tenth precincts and the twelfth through fourteenth precincts inclusive, of the fourteenth representative district as described in the said proclamation, four;

Seventh senatorial district: that portion of the island of Oahu consisting of the sixteenth and seven- [fol. 548] teenth representative districts as described in the said Schedule, four;

Eighth senatorial district: the islands of Kauai and Niihau, one."

SECTION 2. On or before June 1, of the year 1975, and of each tenth year thereafter, the governor shall reappor-

tion the members of the senate in the following manner: The total number of senators shall first be reapportioned among four basic areas, namely, (1) the island of Hawaii, (2) the islands of Maui, Molokai, Lanai and Kahoolawe, (3) the island of Oahu and all other islands not specifically enumerated, and (4) the islands of Kauai and Niihau on the basis of the number of voters registered at the last preceding general election in each of such basic areas and computed by the method known as the method of equal proportions, no basic area to receive less than one member. Upon the determination of the total number of senators to which each basic area is entitled, such total shall be reapportioned among the one or more senatorial districts within each basic area on the basis of the number of voters registered at the last preceding general election within each of such senatorial districts and computed by the method known as the method of equal proportions, no senatorial district to receive less than one member. Upon any reapportionment, should the total number of voters registered in any senatorial district be less than one-half of the quotient obtained by dividing the total number of voters registered in the State by the total number of mem- [fol. 549] bers to which the senate is entitled, then, as part of such reapportionment, the basic area within which such senatorial district lies shall be redistricted by the governor in such manner that the total number of voters registered in each new senatorial district therein shall be more than one-half of such quotient, provided, however, that there shall be at least one senatorial district in each basic area.

Upon completion of the reapportionment of the senate as provided herein, the governor shall issue a proclamation showing the results thereof.

Except as otherwise provided hereinafter, the initial reapportionment shall be effective for the election of members to the senate in 1976 and shall remain in effect for succeeding senatorial elections until the next reapportionment takes effect. Except as otherwise provided hereinafter, any subsequent reapportionment shall be effective

for the election of members to the senate in the year next following such reapportionment and shall remain in effect for succeeding senatorial elections until the next reapportionment takes effect.

An incumbent senator whose term of office does not expire until the second general election following the date of the proclamation, including any such senator whose seat has been apportioned to another district by reapportionment, shall be allowed to complete his four-year term; provided that when the seat of such holdover senator has been reapportioned to another district, the election to fill [fol. 550] the new seat in the district to which such seat has been newly apportioned shall not be held until the time of the second election following such proclamation.

Original jurisdiction is hereby vested in the supreme court of the State to be exercised on the application of any registered voter, made within thirty days following the date specified above, to compel, by mandamus or otherwise, the governor to perform the above duty; and made within thirty days following the date of such proclamation, to compel, by mandamus or otherwise, the correction of any error made in such reapportionment.

SECTION 3. The terms of all members of the senate elected or appointed prior to the general election of 1966 shall terminate on the date of the general election of 1966.

Members of the senate elected at the general election of 1966 shall be divided into two classes.

Members of the first class shall hold office for a term of four years beginning with their election and ending on the day of the second general election held thereafter.

Members of the second class shall hold office for a term of two years beginning with their election and ending on the day of the next general election held thereafter.

Upon the expiration of the aforesaid terms of office of members of the respective classes, the term of office of their successors shall be four years.

Of the members to which each senatorial district is [fol. 551] entitled, one-half shall be members of the second class. If the total number of senators to which a senatorial district is entitled is not an even number, the number of members of the first class in such district shall be the quotient of said total number divided by two, rounded off to the next whole number. The remainder shall be members of the second class. Membership in the first and second classes shall be determined by the number of votes cast for each senator in such district. The first class shall consist of those senators, in number corresponding with the number of members of the first class to which such district is entitled, who are elected with the highest number of votes from such district. The remaining senators elected shall constitute the second class.

The senator from a senatorial district that is entitled to one senator shall automatically be a member of the first class.

SECTION 4. This Act shall take effect upon approval by the Governor of the State of Hawaii and by the United States District Court for the District of Hawaii and shall remain in effect until superseded by constitutional amendment; provided that the regular election of 1966, shall be the first election held pursuant to the provisions herein.

[fol. 552]

H. B. 987

THE HOUSE OF REPRESENTATIVES OF THE STATE OF HAWAII

Honolulu, Hawaii
April 14, 1965

We hereby certify that the foregoing Bill passed Final Reading in the House of Representatives of the Third Legislature of the State of Hawaii on April 14, 1965, by not less than two-thirds vote of all the members to which the House is entitled.

/s/ Elmer F. Cravalho
Elmer F. Cravalho
Speaker, House of Representatives

/s/ Shigeto Kanemoto
Shigeto Kanemoto
Clerk, House of Representatives

THE SENATE OF THE STATE OF HAWAII

Honolulu, Hawaii
April 14, 1965

We hereby certify that the foregoing Bill passed Final Reading in the Senate of the Third Legislature of the State of Hawaii on April 14, 1965.

/s/ Kazuhisa Abe
Kazuhisa Abe
President of the Senate

/s/ Seichi Hirai
Seichi Hirai
Clerk of the Senate

[fol. 553]

EXHIBIT "B"

CONF. COM. REP. NO. 1

Honolulu, Hawaii
April 13, 1965

Re: H. B. No. 773
S. D. 1

The Honorable Kazuhisa Abe
President of the Senate
Third Legislature
General Session, 1965
State of Hawaii

Sir:

Your Committee on Conference to which was referred H. B. No. 773, S. D. 1, entitled: "A BILL FOR AN ACT PROPOSING AMENDMENTS TO THE CONSTITUTION OF THE STATE OF HAWAII, RELATING TO THE COMPOSITION, DISTRICTING, REDISTRICTING, APPORTIONMENT, REAPPORTIONMENT, AND CONSTITUTIONAL AMENDMENT PROVISIONS AFFECTING THE STATE SENATE", begs leave to report as follows:

The purpose of this bill is to propose amendments to the Constitution of the State of Hawaii for the reapportionment of the State Senate to comport with the equal protection clause of the Fourteenth Amendment of the Constitution of the United States in conformity with the March 9, 1965 minute order of the United States District Court for the District of Hawaii in *Holt* v. *Richardson*, et al., Civil No. 2308.

Your Committee, upon consideration of the bill with particular attention focused on the re-establishment of senatorial districts, has amended Section 1 thereof to read as follows:

"SECTION 1. Article III, Section 2 of the Constitution of the State of Hawaii shall be amended to read as follows:

'Senate; Districts; Composition

Section 2. The Senate shall be composed of twenty-five members, who shall be elected by the qualified voters of the respective senatorial districts. Until the next reapportionment, the senatorial districts, and the number of senators to be elected from each, shall be as follows:

First senatorial district: the island of Hawaii, three;

[fol. 554] Second senatorial district: the islands of Maui, Molokai, Lanai and Kahoolawe, two;

Third senatorial district: that portion of the island of Oahu consisting of the eighth representative district as described in the Schedule, Article XVI, Section 1, of the Constitution of the State of Hawaii, as amended, three;

Fourth senatorial district: that portion of the island of Oahu consisting of the ninth and tenth representative districts as described in the said Schedule and the first and the eighth precincts of the eleventh representative district as described in the governor's proclamation issued September 11, 1964, for the 1964 general election, four;

Fifth senatorial district: that portion of the island of Oahu consisting of the twelfth and thirteenth representative districts as described in the said Schedule and the second through seventh precincts, inclusive, and the ninth through twelfth precincts, inclusive of the eleventh representative district, and the first through fifth precincts, inclusive, and the eighth, eleventh, fifteenth and sixteenth precincts of the fourteenth

representative district as described in the said proclamation, four;

Sixth senatorial district: that portion of the island of Oahu consisting of the fifteenth representative district as described in the said Schedule and the sixth, seventh, ninth and tenth precincts and the twelfth through fourteenth precincts, inclusive, of the fourteenth representative district as described in the said proclamation, four;

Seventh senatorial district: that portion of the island of Oahu consisting of the sixteenth and seventeenth representative districts as described in the said Schedule, four;

Eighth senatorial district: the islands of Kauai and Niihau, one.' "

With the consolidation of the two senatorial districts in Hawaii into one district, each of the counties of Hawaii, Maui, and Kauai shall be one senatorial district. Oahu, with five senatorial districts, is the only county with more than one district. Based on the number of voters registered in the 1964 general election, the senatorial districts in Oahu as above set forth shall contain registered voters as follows:

[fol. 555]

Third senatorial district:		
8th District	27,073	27,073
Fourth senatorial district:		
9th District	8,934	
10th	23,859	
1/11th	1,410	
8/11th	1,577	35,780

Fifth senatorial district:

2/11th	District	1,402	
3/11th		1,101	
4/11th		1,094	
5/11th		830	
6/11th		1,398	
7/11th		1,629	
9/11th		1,169	
10/11th		1,111	
11/11th		1,512	
12	th	915	
	th	11,500	
13th		6,456	
1/14th		2,150	
2/14th		773	
3/14th		819	
4/14th		674	
5/14th		755	
8/14th		948	
11/14th		832	
15/14th		1,334	
16/14th		959	39,361

Sixth senatorial district:

6/14th	District	1,010	
7/14th		983	
9/14th		1,997	
10/14th		1,662	
12/14th		391	
13/14th		1,679	
14/14th		1,605	
15th		31,302	40,629

Seventh senatorial district:

16th	District	18,201	
17th		19,135	37,336

[fol. 556] With respect to other portions of the bill, your Committee feels that no amendments are necessary.

Initially, your Committee was faced with the question as to whether or not its district structuring should adhere as much as possible to single-member districts as opposed to multi-member districts. It has been argued that small, single-member districts may offer an advantage by providing a close relationship between voter and legislator and that it may provide a chance for the voters to become better informed, based on this close relationship. On the other hand, your Committee is deeply concerned that these single-member districts, representing only a very small portion of the State, may tend to be primarily concerned with localized issues and ignore the broader issues facing the State. It may fragment the approach to statewide problems and programs, including economic development and capital improvement programs, to the detriment of the State as a whole.

Hawaii traditionally has had, as a territory and a state, a House of Representatives and a Senate, with a member of the House having a shorter term, representing a smaller constituency and being of a numerically larger body, than a member of the Senate. This experience has proved meaningful in achieving the concept of bicameralism initially sought by the constitutional convention. Simply because it is now declared that the controlling criterion of substantial equality of population for apportioning representation is required to be the same in both houses, your Committee does not believe it necessary to abandon the scheme of a member of the House having a shorter term and representing a smaller constituency than a member of the Senate so long as substantial equality of population among the various districts is achieved. To provide for a single-

member senatorial district may have undesirable effect on the complexion of the two houses in that a senatorial district may, contrary to tradition and experience proved to be desirable, be smaller than a representative district so that a senator will represent a smaller constituency but have a longer term than a member of the House. Accordingly, the senatorial districting as recommended herein provides for senatorial districts that are larger than the representative districts except in the case of the third senatorial district.

Your Committee believes that multi-member districts will provide a better opportunity for increasing the significance of an individual's vote by focusing the individual's attention on a broad spectrum of major community problems as opposed to those of more limited and local concerns.

[fol. 557] On the other hand, if the multi-member district has too large a number of senators or too large a number of vacancies to be filled in the same election, then intelligent voter selection may become quite difficult and the two party system may be weakened. Accordingly, your Committee recommends the division of the existing 4th and 5th senatorial districts on the island of Oahu into five districts which provide an allocation of four senators each to four districts and three senators to the remaining district.

Small single-member districts would further compound the technical and intricate problem of drawing the boundaries of such districts. As the Supreme Court of the United States noted, "Indiscriminate districting, without any regard for political subdivision or natural or historical boundary lines, may be little more than an open invitation to partisan gerrymandering." (*Reynolds* v. *Sims*) Furthermore, your Committee believes that population shifts will more drastically affect the boundaries of many, small single-

member districts than would be true of larger multi-member districts. This means that if small, single-member districts are employed, more frequent reapportionments and readjustments of district boundaries would be required. This concern is particularly significant on Oahu which has experienced a population boom and the massive and rapid development of residential subdivisions to accommodate the increased and mobile population.

Your Committee feels that nine and ten senators from the 4th and 5th senatorial districts respectively, calls for too large an apportionment of senators for the districts concerned. Further, your Committee disapproved the proposal for the creation of nineteen small single-member districts on Oahu for the reasons above stated. Your Committee finds that the division of Oahu into five senatorial districts is reasonable and justifiable.

After determining that reasonably apportioned multi-member districts are justifiable, your Committee then was faced with the task of drawing district boundaries. The solution to this problem required the selection of certain values or characteristics desired in the constituency in addition to registered voter population. The district boundaries as recommended by your Committee basically sets out the boundaries along geographical lines and density of population.

The senatorial districting adheres to the division of the basic areas with respect to the counties of Hawaii, Maui and Kauai. While a remapping of the senatorial districts was necessary for Oahu (a basic area), the districting [fol. 558] plan for the Senate accomplishes the intended apportionment that will assure some voice to the counties as political subdivisions. The recognition of the basic areas in the districting scheme appears to your Committee as a logi-

cal approach since they are and historically have been administered as separate counties and are physically insulated from each other. Additionally, Oahu has been an urban and industrial community while the other areas have remained essentially rural and primarily concerned with agriculture and ranching.

In drawing the district lines as proposed herein, your Committee relied very heavily on the standards of compactness and contiguity. In the districting plan for Oahu, the Koolau Mountain Range is taken as a central and key terrain feature. The windward side of Oahu from Waimanalo through Sunset Beach, primarily a suburban residential area, is proposed as the 3rd senatorial district entitled to three senators. Although it coincides with the boundaries of the eighth representative district, your Committee believes this is justified due to its well-defined geographical separation by the Koolau Range. The leeward side including the Waialua, Wahiawa, Waipahu, Waianae and Aiea plantation and suburban communities makes for a logical consolidation into the 4th senatorial district. The adding of the 1st and 8th precincts of the 11th representative district which include Moanalua, Salt Lake, and Naval Housing area appears to be valid and logical additions to the proposed 4th senatorial district. The remaining senatorial districts on Oahu, to-wit: 5th, 6th, 7th, are bounded by lines running from the Koolau Range to the ocean along well-defined and long established representative district and precinct lines. In the apportionment scheme as proposed, your Committee has in good faith attempted to apportion one senator to every 9,500 registered voters. The greatest disparity appears in the comparison of the 4th senatorial district with 35,780 registered voters and the 6th senatorial district with 40,629 registered voters. Your Committee, although mindful of its duty to construct districts as nearly of equal population as is practicable, found it a practical impossiblity to achieve mathematical exactness with respect to the 4th senatorial district. Dis-

stricting that would provide a larger registered voter population in the 4th senatorial district would have meant the splitting of the heart of the Kalihi community and adding a portion thereof to the leeward Oahu communities which are geographically removed from and foreign to Kalihi. Your Committee believes that the standards of compactness and contiguity and the considerations of areas of population concentration and established and recognized communities should be respected over quantitative precision in this instance if the districting is to be in any way meaningful, and further believes that by these considera- [fol. 559] tions, the disparity is not egregious and the plan proposed herein comports with the equal population principle as required by the equal protection clause.

Your Committee's recommendation for the consolidation of the first and second senatorial districts into the first senatorial district on the island of Hawaii was prompted in large part to equalize the registered voter population of that island with the districts on Oahu to the extent possible. The islands of Maui and Kauai have been kept as two-member and single-member senatorial districts respectively, in view of their establishment as basic areas in the determination of the apportionment scheme for the legislature.

Before deciding upon the final districting plan for the senate, your Committee gave serious consideration to alternative plans involving two-member and three-member senatorial districts for Oahu. Your Committee's rejection of two-member districts was based on objections enumerated herein against single-member districts. A plan calling for three-member districts on Oahu would mean dividing the island into seven districts. As a practical matter, many of these seven districts would closely approach the population and geographical sizes of the ten existing representative districts. Your Committee is of the opinion that a senate districting plan based on three-member districts

would dissipate one of the real basis for bicameralism in our State Legislature.

In the light of the considerations above set forth, your Committee believes that senatorial districts, as set forth in this bill, have been constructed so as to achieve districts as nearly of equal population as is practicable and to provide for fair and effective representation of all citizens.

Your Committee is in accord with the purpose and intent of H. B. No. 773, S. D. 1, as amended herein, and recommends its passage on final reading in the form attached hereto as H. B. No. 773, S. D. 1, C. D. 1.

[fol. 560] Respectfully submitted,

MANAGERS ON THE PART OF THE SENATE

/s/ Sakae Takahashi
Sakae Takahashi, Chairman

/s/ O. Vincent Esposito W/R
O. Vincent Esposito, Vice Chairman

/s/ Yasutaka Fukushima (W/R)
Yasutaka Fukushima, Member

/s/ Mitsuyuki Kido
Mitsuyuki Kido, Member

/s/ Noboru Miyake (WR)
Noboru Miyake, Member

/s/ John T. Ushijima
John T. Ushijima, Member

/s/ Nadao Yoshinaga
Nadao Yoshinaga, Member

MANAGERS ON THE PART OF THE HOUSE

/s/ James H. Wakatsuki
James H. Wakatsuki, Chairman

/s/ Tadao Beppu
Tadao Beppu, Vice Chairman

/s/ James K. Clark
James K. Clark, Member

/s/ George W. T. Loo
George W. T. Loo, Member

/s/ Barney B. Menor
Barney B. Menor, Member

/s/ Katsugo Miho
Katsugo Miho, Member

/s/ George M. Okano
George M. Okano, Member

/s/ Robert C. Oshiro
Robert C. Oshiro, Member

/s/ Frederick W. Rohlfing W.R.
Frederick W. Rohlfing, Member

/s/ Rudolph Pacarro
Rudolph Pacarro, Member

[fol. 561]

CONF. COM. REP. NO. 1

Honolulu, Hawaii
April 12, 1965

Re: H. B. No. 773
S. D. 1
C. D. 1

The Honorable Elmer F. Cravalho
Speaker, House of Representatives
Third Legislature
General Session, 1965
State of Hawaii

Sir:

Your Committee on Conference to which was referred H. B. No. 773, S. D. 1, entitled: "A BILL FOR AN ACT PROPOSING AMENDMENTS TO THE CONSTITUTION OF THE STATE OF HAWAII, RELATING TO THE COMPOSITION, DISTRICTING, REDISTRICTING, APPORTIONMENT, REAPPORTIONMENT, AND CONSTITUTIONAL AMENDMENT PROVISIONS AFFECTING THE STATE SENATE," begs leave to report as follows:

The purpose of this bill is to propose amendments to the Constitution of the State of Hawaii for the reapportionment of the State Senate to comport with equal protection clause of the Fourteenth Amendment of the Constitution of the United States in conformity with the March 9, 1965 minute order of the United States District Court for the District of Hawaii in *Holt* v. *Richardson,* et al, Civil No. 2308.

Your Committee, upon consideration of the bill with particular attention focused on the re-establishment of senatorial districts, has amended Section 1 thereof to read as follows:

"SECTION 1. Article III, Section 2 of the Constitution of the State of Hawaii shall be amended to read as follows:

'Senate; Districts; Composition

Section 2. The Senate shall be composed of twenty-five members, who shall be elected by the qualified voters of the respective senatorial districts. Until the next reapportionment, the senatorial districts, and the number of senators to be elected from each, shall be as follows:

First senatorial district: the island of Hawaii, three;

[fol. 562] Second senatorial district: the islands of Maui, Molokai, Lanai and Kahoolawe, two;

Third senatorial district: that portion of the island of Oahu consisting of the eighth representative district as described in the Schedule, Article XVI, Section 1, of the Constitution of the State of Hawaii, as amended, three;

Fourth senatorial district: that portion of the island of Oahu consisting of the ninth and tenth representative districts as described in the said Schedule and the first and the eighth precincts of the eleventh representative district as described in the governor's proclamation issued September 11, 1964, for the 1964 general election, four;

Fifth senatorial district: that portion of the island of Oahu consisting of the twelfth and thirteenth representative districts as described in the said Schedule and the second through seventh precincts, inclusive, and the ninth through twelfth precincts, inclusive of the eleventh representative district, and the first through fifth precincts, inclusive, and the eighth, eleventh, fifteenth and sixteenth precincts of the fourteenth representative district as described in the said proclamation, four;

Sixth senatorial district: that portion of the island of Oahu consisting of the fifteenth representative district as described in the said Schedule and the sixth, seventh, ninth and tenth precincts and the twelfth through fourteenth precincts, inclusive, of the fourteenth representative district as described in the said proclamation, four;

Seventh senatorial district: that portion of the island of Oahu consisting of the sixteenth and seventeenth representative districts as described in the said Schedule, four;

Eighth senatorial district: the islands of Kauai and Niihau, one.'"

With the consolidation of the two senatorial districts in Hawaii into one district, each of the counties of Hawaii, Maui, and Kauai shall be one senatorial district. Oahu, with five senatorial districts, is the only county with more than one district. Based on the number of voters registered in the 1964 general election, the senatorial districts in Oahu as above set forth shall contain registered voters as follows:

[fol. 563]

Third senatorial district:

8th District	27,073	27,073

Fourth senatorial district:

9th District	8,934	
10th	23,859	
1/11th	1,410	
8/11th	1,577	35,780

Fifth senatorial district:

2/11th District	1,402	
3/11th	1,101	
4/11th	1,094	
5/11th	830	
6/11th	1,398	
7/11th	1,629	
9/11th	1,169	
10/11th	1,111	
11/11th	1,512	
12/11th	915	
12th	11,500	
13th	6,456	
1/14th	2,150	
2/14th	773	
3/14th	819	
4/14th	674	
5/14th	755	
8/14th	948	
11/14th	832	
15/14th	1,334	
16/14th	959	39,361

Sixth senatorial district:

6/14th District	1,010	
7/14th	983	
9/14th	1,997	
10/14th	1,662	
12/14th	391	
13/14th	1,679	
14/14th	1,605	
15th	31,302	40,629

Seventh senatorial district:

16th District	18,201	
17th	19,135	37,336

[fol. 564] With respect to other portions of the bill, your Committee feels that no amendments are necessary.

Initially, your Committee was faced with the question as to whether or not its district structuring should adhere as much as possible to single-member districts as opposed to multi-member districts. It has been argued that small, single-member districts may offer an advantage by providing a close relationship between voter and legislator and that it may provide a chance for the voters to become better informed, based on this close relationship. On the other hand, your Committee is deeply concerned that these single-member districts, representing only a very small portion of the State, may tend to be primarily concerned with localized issues and ignore the broader issues facing the State. It may fragment the approach to statewide problems and programs, including economic development and capital improvement programs, to the detriment of the State as a whole.

Hawaii traditionally has had, as a territory and a state, a House of Representatives and a Senate, with a member of the House having a shorter term, representing a smaller constituency and being of a numerically larger body, than a member of the Senate. This experience has proved meaningful in achieving the concept of bicameralism initially sought by the constitutional convention. Simply because it is now declared that the controlling criterion of substantial equality of population for apportioning representation is required to be the same in both houses, your Committee does not believe it necessary to abandon the scheme of a member of the House having a shorter term and representing a smaller constituency than a member of the Senate so long as substantial equality of population among the various districts is achieved. To provide for a single-member senatorial district may have undesirable effect on the complexion of the two houses in that a senatorial district may, contrary to tradition and experience proved to be desirable, be smaller than a representative district so that a senator will represent a smaller constituency but have a

longer term than a member of the House. Accordingly, the senatorial districting as recommended herein provides for senatorial districts that are larger than the representative districts except in the case of the third senatorial district.

Your Committee believes that multi-member districts will provide a better opportunity for increasing the significance of an individual's vote by focusing the individual's attention on a broad spectrum of major community problems as opposed to those of more limited and local concerns. On the other hand, if the multi-member district has too [fol. 565] large a number of senators or too large a number of vacancies to be filled in the same election, then intelligent voter selection may become quite difficult and the two party system may be weakened. Accordingly, your Committee recommends the division of the existing 4th and 5th senatorial districts on the island of Oahu into five districts which provide an allocation of four senators each to four districts and three senators to the remaining district.

Small single-member districts would further compound the technical and intricate problem of drawing the boundaries of such districts. As the Supreme Court of the United States noted, "Indiscriminate districting, without any regard for political subdivision or natural or historical boundary lines, may be little more than an open invitation to partisan gerrymandering." (*Reynolds* v. *Sims*) Furthermore, your Committee believes that population shifts will more drastically affect the boundaries of many, small single-member districts than would be true of larger multi-member districts. This means that if small, single-member districts are employed, more frequent reapportionments and readjustments of district boundaries would be required. This concern is particularly significant on Oahu which has experienced a population boom and the massive and rapid development of residential subdivisions to accommodate the increased and mobile population.

Your Committee feels that nine and ten senators from the 4th and 5th senatorial districts respectively, calls for

too large an apportionment of senators for the districts concerned. Further, your Committee disapproved the proposal for the creation of nineteen small single-member districts on Oahu for the reasons above stated. Your Committee finds that the division of Oahu into five senatorial districts is reasonable and justifiable.

After determining that reasonably apportioned multi-member districts are justifiable, your Committee then was faced with the task of drawing district boundaries. The solution to this problem required the selection of certain values or characteristics desired in the constituency in addition to registered voter population. The district boundaries as recommended by your Committee basically sets out the boundaries along geographical lines and density of population.

The senatorial districting adheres to the division of the basic areas with respect to the counties of Hawaii, Maui and Kauai. While a remapping of the senatorial districts was necessary for Oahu (a basic area), the districting plan [fol. 566] for the Senate accomplishes the intended apportionment that will assure some voice to the counties as political subdivisions. The recognition of the basic areas in the districting scheme appears to your Committee as a logical approach since they are and historically have been administered as separate counties and are physically insulated from each other. Additionally, Oahu has been an urban and industrial community while the other areas have remained essentially rural and primarily concerned with agriculture and ranching.

In drawing the district lines as proposed herein, your Committee relied very heavily on the standards of compactness and contiguity. In the districting plan for Oahu, the Koolau Mountain Range is taken as a central and key terrain feature. The windward side of Oahu from Waimanalo through Sunset Beach, primarily a suburban residential area, is proposed as the 3rd senatorial district entitled to three senators. Although it coincides with the boundaries of the eighth representative district, your Com-

mittee believes this is justified due to its well-defined geographical separation by the Koolau Range. The leeward side including the Waialua, Wahiawa, Waipahu, Waianae and Aiea plantation and suburban communities makes for a logical consolidation into the 4th senatorial district. The adding of the 1st and 8th precincts of the 11th representative district which include Moanalua, Salt Lake, and Naval Housing area appears to be valid and logical additions to the proposed 4th senatorial district. The remaining senatorial districts on Oahu, to-wit: 5th, 6th, 7th, are bounded by lines running from the Koolau Range to the ocean along well-defined and long established representative district and precinct lines. In the apportionment scheme as proposed, your Committee has in good faith attempted to apportion one senator to every 9,500 registered voters. The greatest disparity appears in the comparison of the 4th senatorial district with 35,780 registered voters and the 6th senatorial district with 40,629 registered voters. Your Committee, although mindful of its duty to construct districts as nearly of equal population as is practicable, found it a practical impossibility to achieve mathematical exactness with respect to the 4th senatorial district. Districting that would provide a larger registered voter population in the 4th senatorial district would have meant the splitting of the heart of the Kalihi community and adding a portion thereof to the leeward Oahu communities which are geographically removed from and foreign to Kalihi. Your Committee believes that the standards of compactness and contiguity and the considerations of areas of population concentration and established and recognized communities should be respected over quantitative precision in this instance if the districting is to be in any way meaningful, and further believes that by these considerations, [fol. 567] the disparity is not egregious and the plan proposed herein comports with the equal population principle as required by the equal protection clause.

Your Committee's recommendation for the consolidation of the first and second senatorial districts into the first senatorial district on the island of Hawaii was prompted

in large part to equalize the registered voter population of that island with the districts on Oahu to the extent possible. The islands of Maui and Kauai have been kept as two-member and single-member senatorial districts respectively, in view of their establishment as basic areas in the determination of the apportionment scheme for the legislature.

Before deciding upon the final districting plan for the senate, your Committee gave serious consideration to alternative plans involving two-member and three-member senatorial districts for Oahu. Your Committee's rejection of two-member districts was based on objections enumerated herein against single-member districts. A plan calling for three-member districts on Oahu would mean dividing the island into seven districts. As a practical matter, many of these seven districts would closely approach the population and geographical sizes of the ten existing representative districts. Your Committee is of the opinion that a senate districting plan based on three-member districts would dissipate one of the real basis for bicameralism in our State Legislature.

In the light of the considerations above set forth, your Committee believes that senatorial districts, as set forth in this bill, have been constructed so as to achieve districts as nearly of equal population as is practicable and to provide for fair and effective representation of all citizens.

Your Committee is in accord with the purpose and intent of H. B. No. 773, S. D. 1, as amended herein, and recommends its passage on final reading in the form attached hereto as H. B. No. 773, S. D. 1, C. D. 1.

[fol. 568] Respectfully submitted,

MANAGERS ON THE PART OF THE SENATE

/s/ Sakae Takahashi
Sakae Takahashi, Chairman

/s/ O. Vincent Esposito W/R
O. Vincent Esposito, Vice Chrm.

/s/ YASUTAKA FUKUSHIMA (W/R)
Yasutaka Fukushima, Member

/s/ MITSUYUKI KIDO
Mitsuyuki Kido, Member

/s/ N. MIYAKE (WR)
Noboru Miyake, Member

/s/ JOHN T. USHIJIMA
John T. Ushijima, Member

/s/ NADAO YOSHINAGA
Nadao Yoshinaga, Member

MANAGERS ON THE PART OF THE HOUSE

/s/ JAMES H. WAKATSUKI
James H. Wakatsuki, Chairman

/s/ TADAO BEPPU
Tadao Beppu, Vice Chrm.

/s/ JAMES K. CLARK
James K. Clark, Member

/s/ GEORGE W. T. LOO (W.R.)
George W. T. Loo, Member

/s/ BARNEY B. MENOR
Barney B. Menor, Member

/s/ KATSUGO MIHO
Katsugo Miho, Member

/s/ GEORGE M. OKANO
George M. Okano, Member

/s/ ROBERT C. OSHIRO
Robert C. Oshiro, Member

/s/ FREDERICK W. ROHLFING W.R.
Frederick W. Rohlfing, Member

/s/ RUDOLPH PACARRO
Rudolph Pacarro, Member

[fol. 569]
(To be made one and eight copies)

THIRD LEGISLATURE, 1965
STATE OF HAWAII

H.B. No. 773
S. D. 1
C. D. 1

A BILL FOR AN ACT

PROPOSING AMENDMENTS TO THE CONSTITUTION OF THE STATE OF HAWAII, RELATING TO THE COMPOSITION, DISTRICTING, REDISTRICTING, APPORTIONMENT, REAPPORTIONMENT, AND CONSTITUTIONAL AMENDMENT PROVISIONS AFFECTING THE STATE SENATE.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

SECTION 1. Article III, Section 2 of the Constitution of the State of Hawaii shall be amended to read as follows:

"*Senate; Districts; Composition*

Section 2. The Senate shall be composed of twenty-five members, who shall be elected by the qualified voters of the respective senatorial districts. Until the next reapportionment, the senatorial districts, and the number of senators to be elected from each, shall be as follows:

First senatorial district: the island of Hawaii, three;

Second senatorial district: the islands of Maui, Molokai, Lanai and Kahoolāwe, two;

Third senatorial district: that portion of the island of Oahu consisting of the eighth representative district as described in the Schedule, Article XVI, Section 1, of the Constitution of the State of Hawaii, as amended, three;

Fourth senatorial district: that portion of the island of Oahu consisting of the ninth and tenth representative districts as described in the said Schedule and the

[fol. 570] first and the eighth precincts of the eleventh representative district as described in the governor's proclamation issued September 11, 1964, for the 1964 general election, four;

Fifth senatorial district: that portion of the island of Oahu consisting of the twelfth and thirteenth representative districts as described in the said Schedule and the second through seventh precincts, inclusive, and the ninth through twelfth precincts, inclusive, of the eleventh representative district, and the first through fifth precincts, inclusive, and the eighth, eleventh, fifteenth and sixteenth precincts of the fourteenth representative district as described in the said proclamation, four;

Sixth senatorial district: that portion of the island of Oahu consisting of the fifteenth representative district as described in the said Schedule and the sixth, seventh, ninth and tenth precincts and the twelfth through fourteenth precincts, inclusive, of the fourteenth representative district as described in the said proclamation, four;

Seventh senatorial district: that portion of the island of Oahu consisting of the sixteenth and seventeenth representative districts as described in the said Schedule, four;

Eighth senatorial district: the islands of Kauai and Niihau, one."

SECTION 2. Article III of the Constitution of the State of Hawaii shall be amended by adding thereto a new section, [fol. 571] to be designated "Section 2.1" next following Section 2 thereof, to read as follows:

"Reapportionment of Senate

Section 2.1. On or before June 1 of the year 1975, and of each tenth year thereafter, the governor shall

reapportion the members of the senate in the following manner: the total number of senators shall first be reapportioned among four basic areas, namely, (1) the island of Hawaii, (2) the islands of Maui, Molokai, Lanai and Kahoolawe, (3) the island of Oahu and all other islands not specifically enumerated, and (4) the islands of Kauai and Niihau, on the basis of the number of voters registered at the last preceding general election in each of such basic areas and computed by the method known as the method of equal proportions, no basic area to receive less than one member. Upon the determination of the total number of senators to which each basic area is entitled, such total shall be reapportioned among the one or more senatorial districts within each basic area on the basis of the number of voters registered at the last preceding general election within each of such senatorial districts and computed by the method known as the method of equal proportions, no senatorial district to receive less than one member. Upon any reapportionment, should the total number of voters registered in any senatorial district be less than one-half of the quotient obtained by dividing the total number of voters registered in [fol. 572] the State by the total number of members to which the senate is entitled, then, as part of such reapportionment, the basic area within which such senatorial district lies shall be redistricted by the governor in such manner that the total number of voters registered in each new senatorial district therein shall be more than one-half of such quotient, provided, however, that there shall be at least one senatorial district in each basic area.

Upon completion of the reapportionment of the senate as provided herein, the governor shall issue a proclamation showing the results thereof.

Except as otherwise provided hereinafter, the initial reapportionment shall be effective for the election of

members to the senate in 1976 and shall remain in effect for succeeding senatorial elections until the next reapportionment takes effect. Except as otherwise provided hereinafter, any subsequent reapportionment shall be effective for the election of members to the senate in the year next following such reapportionment and shall remain in effect for succeeding senatorial elections until the next reapportionment takes effect.

An incumbent senator whose term of office does not expire until the second general election following the date of the proclamation, including any such senator whose seat has been apportioned to another district by reapportionment, shall be allowed to complete his [fol. 573] four-year term; provided that when the seat of such holdover senator has been reapportioned to another district, the election to fill the new seat in the district to which such seat has been newly apportioned shall not be held until the time of the second election following such proclamation.

Original jurisdiction is hereby vested in the supreme court of the State to be exercised on the application of any registered voter, made within thirty days following the date specified above, to compel, by mandamus or otherwise, the governor to perform the above duty and made within thirty days following the date of such proclamation, to compel, by mandamus or otherwise, the correction of any error made in such reapportionment."

SECTION 3. Article III, Section 5, of the Constitution of the State of Hawaii shall be amended by substituting a semicolon for the period at the end of the second sentence thereof and adding the following thereafter:

"provided that members of the senate elected at the general election of 1966 shall be divided into two classes. Members of the first class shall hold office for a term of four years beginning with their election and

ending on the day of the second general election held thereafter. Members of the second class shall hold office for a term of two years beginning with their election and ending on the day of the next general [fol. 574] election held thereafter. Upon the expiration of the aforesaid terms of office of members of the respective classes, the term of office of their successors shall be four years. Of the members to which each senatorial district is entitled, one-half shall be members of the second class. If the total number of senators to which a senatorial district is entitled is not an even number, the number of members of the first class in such district shall be the quotient of said total number divided by two, rounded off to the next whole number. The remainder shall be members of the second class. Membership in the first and second classes shall be determined by the number of votes cast for each senator in such district. The first class shall consist of those senators, in number corresponding with the number of members of the first class to which such district is entitled, who are elected with the highest number of votes from such district. The remaining senators elected shall constitute the second class. The senator from a senatorial district that is entitled to one senator shall automatically be a member of the first class."

SECTION 4. Article XV, Section 2, of the Constitution of the State of Hawaii shall be amended by substituting a period for the semicolon in the sixth paragraph thereof and by deleting from the sixth paragraph the proviso at the end of said paragraph, which reads:

[fol. 575] "provided, that no constitutional amendment altering this proviso or the representation from any senatorial district in the senate shall become effective unless it shall also be approved by a majority of the votes tallied upon the question in each of a majority of the counties."

SECTION 5. The foregoing amendments shall take effect upon compliance with the provisions of Article XV, Section 3, of the Constitution of the State of Hawaii; provided that the proviso now in Article XV, Section 2, paragraph 6, shall not be applicable.

[fol. 576] H. B. No. 773

THE HOUSE OF REPRESENTATIVES OF THE STATE OF HAWAII

Honolulu, Hawaii
April 14, 1965

We hereby certify that the foregoing Bill passed Final Reading in the House of Representatives of the Third Legislature of the State of Hawaii on April 14, 1965, by not less than two-thirds vote of all the members to which the House is entitled.

/s/ Elmer F. Cravalho
Elmer F. Cravalho
Speaker, House of Representatives

/s/ Shigeto Kanemoto
Shigeto Kanemoto
Clerk, House of Representatives

THE SENATE OF THE STATE OF HAWAII

Honolulu, Hawaii
April 14, 1965

We hereby certify that the foregoing Bill passed Final Reading in the Senate of the Third Legislature of the State of Hawaii on April 14, 1965.

/s/ Kazuhisa Abe
Kazuhisa Abe
President of the Senate

/s/ Seichi Hirai
Seichi Hirai
Clerk of the Senate

[fol. 577]

EXHIBIT "C"

(See opposite) ☞

THIRD LEGISLATURE, 1965
STATE OF HAWAII

H.B. NO. 986

A BILL FOR AN ACT

RELATING TO A CONSTITUTIONAL CONVENTION

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

SECTION 1. Purpose. Article XV, section 2, of the Constitution of the State of Hawaii provides that the legislature may submit to the electorate at any general or special election the question, "Shall there be a convention to propose a revision of or amendments to the constitution?" It is the purpose of this Act to provide for the submission of such question at the general election of 1966 in conformity with the March 9, 1965 minute order of the United States District Court for the District of Hawaii in Civil No. 2308.

SECTION 2. Submission of question. The legislature hereby submits the question, "Shall there be a convention to propose a revision of or amendments to the constitution?" to the electorate, which question shall be voted on at the general election of 1966.

SECTION 3. This Act shall take effect upon its approval.

INTRODUCED BY:

[fol. 577]

EXHIBIT "C"

147

[fol. 578]

[fol. 579] H. B. No. 986

THE HOUSE OF REPRESENTATIVES OF THE STATE OF HAWAII

Honolulu, Hawaii
April 14, 1965

We hereby certify that the foregoing Bill passed Third Reading in the House of Representatives of the Third Legislature of the State of Hawaii on March 16, 1965.

/s/ Elmer F. Cravalho
Elmer F. Cravalho
Speaker, House of Representatives

/s/ Shigeto Kanemoto
Shigeto Kanemoto
Clerk, House of Representatives

THE SENATE OF THE STATE OF HAWAII

Honolulu, Hawaii
April 14, 1965

We hereby certify that the foregoing Bill passed Third Reading in the Senate of the Third Legislature of the State of Hawaii on March 18, 1965.

/s/ Kazuhisa Abe
Kazuhisa Abe
President of the Senate

/s/ Seichi Hirai
Seichi Hirai
Clerk of the Senate

[fol. 580]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

Civil No. 2308

[Title omitted]

ORDER STAYING INJUNCTION—April 19, 1965

This court feeling that good cause exists for the same:

It Is Ordered that the injunctive restraint imposed by those portions only of the "Decision and Order" of this court of February 17, 1965, as well as the "Final Order on Motion to Alter or Amend Judgment" of March 19, 1965, enjoining the legislators and parties to this action from taking final action on any legislation (subject to certain exceptions set forth therein) until the State Legislature in regular session in 1965 should have enacted and adopted the reapportionment legislation specified in the above "Decision" and "Final Order" is hereby stayed until such time as this court shall have filed its Decision and Order upon H. B. 987, S. D. 1, Conf. D. 1, and other proposed legislation submitted and filed in this court by Intervenors-Defendants Nelson K. Doi, et al., and Elmer F. Cravalho, et al., on April 14, 1965, or until further order of this court.

It Is Further Ordered that this stay shall take effect [fol. 581] forthwith.

Dated: Honolulu, Hawaii, this 19th day of April, 1965.

Gilbert H. Jertberg, Circuit Judge, William T. Beeks, District Judge, Martin Pence, District Judge.

[File endorsement omitted]

[fol. 582]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

Civil No. 2308

HENRIETTA DAVIDSON HOLT, et al., Plaintiffs,

vs.

WILLIAM S. RICHARDSON, Lieutenant Governor of Hawaii, Defendant,

JOHN J. HULTEN, et al., and JOHN A. BURNS, Governor of Hawaii, Intervenors-Plaintiffs,

NELSON K. DOI, et al., and ELMER F. CRAVALHO, et al., Intervenors-Defendants.

DECISION AND ORDER ON HAWAII'S SENATE REAPPORTIONMENT PLAN OF APRIL 14, 1965—Dated April 28, 1965

This court has now before it the Hawaii State Legislature's H.B. No. 987, S.D. 1, C.D. 1; H.B. No. 773, S.D. 1, C.D. 1; and H.B. No. 986, setting forth that body's response to this court's order of March 9, 1965, viz., presenting (a) a plan for the provisional reapportionment of the Senate on the basis of the voters registered for the 1964 general election; (b) a proposed constitutional amendment encompassing the same plan; and (c) a submission to the electorate in 1966 of the question of calling a constitutional convention.

The road by which the above bills reached this court is tortuous. In August of 1964, when this court first heard this case, the Legislature of Hawaii was then sitting in special session called by the Governor of Hawaii for the specific purpose of attempting to devise a scheme of legislative reapportionment which would be constitutionally [fol. 583] valid. The legislature at that session failed to

agree on any reapportionment plan. After a hearing in January 1965, this court, on February 17, 1965, found that Article III, Section 2, of the Hawaii State Constitution fixing the number of senators per senatorial district, as well as the proviso at the end of the sixth paragraph in Section 2 of Article XV of the constitution, were invalid, "determined that the Senate *at least* must be reapportioned before the 1966 general election," and enjoined the Third State Legislature in its regular 1965 session from passing any but preliminary "housekeeping" acts until it had set up the machinery for the convening of a constitutional convention to amend the State's legislative scheme of apportionment before the 1966 election. (Emphasis added.)

On March 1st, 1965, the legislature, then convened in regular session, requested this court to alter its order of February 17th so as to permit the legislature itself during that session to pass legislation:

(a) enacting a provisional plan for reapportioning the senate on the basis of the 1964 registered voters, to be effective for the 1966 election and until a constitutional amendment on reapportionment had been adopted by the people of Hawaii as provided in the constitution;

(b) adopting a proposed constitutional amendment embodying pertinent provisions of the foregoing reapportionment plan to be presented to the electorate for ratification at the 1966 general election; and

(c) submitting to the electorate at that 1966 election the question, under Article XV of the State constitution: Shall there be a convention to propose a revision of or amendments to the constitution?

Counsel for all parties to the suit were in accord with the objectives outlined in the motion, and this court was [fol. 584] satisfied from the representations made that the constitutional convention route prescribed by its February 17th order would be very expensive and perforce would demand the devotion of great time and effort from the people

of Hawaii. The court, then, also believed that the legislators, each and all, would recognize their obligations to the entire electorate of Hawaii, would rise above any possible self-interest, would heed the admonitions of the Attorney General, and would certainly note the flashing red lights of the caveats set out in this court's order of February 17th, viz., that a constitutional convention *in addition* to providing for reapportionment of the senate might also consider (1) whether the registered voter population should continue to be used as the basis for apportionment, or some other type of population basis should be adopted; (2) "whether it is better to have one or both houses of the legislature composed of single member representative districts, or to have and *justify*[9] one or both houses composed in whole or in part, of multi-member or floterial districts. (Note) [9] *Butcher v. Bloom,* 203 A.2d 556, 572-73" (emphasis added); (3) whether there should be a change in the date of decennial reapportionment; and (4) whether there should be redistricting of the representative districts.

This court therefore, by order of March 9, 1965, altered its February 17th order to permit the legislature (a) to enact a provisional reapportionment and redistricting plan for the senate; (b) to adopt "a proposed constitutional amendment embodying *pertinent* provisions of the foregoing reapportionment and redistricting plan" for submission to the electorate at the 1966 general election (emphasis added); (c) to enact legislation to submit to the electorate the question: Shall there be a convention to [fol. 585] propose a revision of or amendments to the constitution? This order, like the one of February 17th, demanded that the plan be approved by this court; failing approval, the order of February 17th demanding legislation for implementing a constitutional convention would again become effective.

On March 18th this court was advised that a provisional plan, in substance approved by both houses, was then in conference committee and about ready to be presented to this court, whereby the senate was reapportioned by dividing the State into the same original six senatorial dis-

tricts, changing only the number of senators allocated to each district, based upon the use of the method of equal proportion. By that March 18th plan, two senators were apportioned to the first senatorial district—East Hawaii; one to the second—West Hawaii; two to the third—Maui; nine to the fourth—Southern Oahu; ten to the fifth—the remainder of Oahu; and one to the sixth—Kauai.

The legislature quickly thereafter was informally made to understand that such a grossly lumpy apportionment of senators, whereby forty per cent of the entire senate would come from one senatorial district and thirty-six per cent from another alongside, could never be approved, and the plan was forthwith withdrawn from conference committee for reconsideration by the house of representatives. Shortly thereafter, this court flashed an even brighter red light on its caveat number (2) above by informally indicating that because Hawaii had a multi-member district house, any other than single member senatorial districting would have to be justified to this court.

On April 14th, 1965, the legislature passed and sent to this court the numbered bills identified *supra*:

A. H.B. 987, its proposed provisional senatorial reap- [fol. 586] portionment plan; H.B. 773, its proposed constitutional amendment embodying that same plan; and H.B. 986, submitting to the electorate in the 1966 general election the question of the calling of a constitutional convention. By H.B. 987, the State was divided into eight senatorial districts, viz.:

County	*Senatorial District*	*No. of Senators*	*1964 Registered Voters per District*
Hawaii	First	3	28,130
Maui	Second	2	18,786
Honolulu	Third	3	27,073
"	Fourth	4	35,780
"	Fifth	4	39,361
"	Sixth	4	40,629
"	Seventh	4	37,336
Kauai	Eighth	1	12,266

B. Exhibits A and B, attached to the plan, the same being the reports of the conference committee on the proposed provisional plan (H.B. 987), as well as the proposed plan for the constitutional amendment (H.B. 773) embodying the same, setting forth the conference committee's "justification" for wholly abandoning any attempt to redistrict the senate on a single member district basis.

Senate exhibits Nos. 5 and 6 (maps also filed), outlined the geographical boundaries of the respective senatorial districts of Honolulu.

The court would agree that the number of registered voters per senatorial district and apportioned to the four basic areas, viz., three to the County of Hawaii, two to the County of Maui, nineteen to the City and County of Honolulu, and one to the County of Kauai, conforms to the standards required under the method of equal proportions prescribed by the Constitution of the State of Hawaii and thus meets that one test of constitutionality. *Roman* v. *Sincock,* 377 U.S. 695 (1964); *Reynolds* v. *Sims,* 377 U.S. 533 (1964).

In the attached committee reports, the reasons given, i.e., "justification", for choosing multi-member districts of [fol. 587] three and four senators per district were substantially: (1) single-member districts would tend to cause the senators therefrom to be concerned with localized issues and ignore the broader issues facing the State, and therefore it might fragment the approach to state-wide problems and programs to the detriment of the State; (2) historically the members of the house had represented smaller constituencies than members of the senate, and tradition and experience had proved that balance desirable; (3) multi-member districts would increase the significance of an individual's vote by focusing his attention on the broad spectrum of major community problems as opposed to those of more limited and local concern; (4) to set up single-member districts would compound the more technical and more intricate problem of drawing the boundaries; (5) population shifts would more drastically affect the boundaries of many smaller single-member districts—to a greater

degree than would be found in larger multi-member districts, citing Oahu's population boom and subdivision development.

In drawing the district lines the legislature reported that it "relied very heavily" on the standards of compactness and contiguity—"geographical separation and long-established representative precinct lines."

Except for the slightly misleading conclusion that the third senatorial district was *primarily* a suburban area, and that the fourth senatorial district was composed of substantially plantation and suburban communities, from the report it appears that no other criteria, save number of registered voters, geographical boundaries and historical representative district lines were considered or used in forming the plan. Apparently, ethnic, political, industrial, economic, social, occupational factors, and community of [fol. 588] interests and problems were given little if any consideration by the legislature.

The testimony of Senator Sakai Takahashi, chairman of the conference committee, at the April 15, 1965 hearing on the plan, summed up the legislature's underlying raison d'etre with his statement: "We thought it fair."

Mr. Robert Schmitt, statistician, who had testified at length in the hearing of August 1964, again a witness, testified in favor of applying the law of large numbers, viz., that smaller areas with small numbers fluctuate in much greater proportion than do larger areas with larger numbers, to senatorial districts. He, however, had *not been consulted* on the problem of the multi-member districts vs. single-member, or the problem of district lines.[1]

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[1] In its (unsubmitted) plan of March 18th, *supra* p. 4, two senators were to be elected from East Hawaii, and one senator from West Hawaii. The total registered voters in 1964 in East Hawaii was 20,770, and in West Hawaii was 7,360. In the present provisional plan, this division of the Island of Hawaii was dropped and three senators were to be elected from the first senatorial district, which would now include the entire island. Of the seven senators presently elected from districts one and two, five live within a short distance of each other in Hilo, in East Hawaii.

In analyzing the plant, all Mr. Schmitt could say for the third senatorial district was that it had excellent statistical boundaries.[2] It was logical to deduce from his testimony that the boundary between the fourth and fifth senatorial districts had accidentally resulted in an excellent *line of division,* in that it separated the military area, i.e., military housing, etc., from the city proper. The best that he could say, however, for the line between the fifth and sixth senatorial districts was that it neatly separated the central business district from residential areas alongside. The line between the sixth and seventh senatorial districts was historical.

Mr. Schmitt, in contradistinction to the conference committee, found it necessary to analyze the representative districts and criticized many of them as being far too [fol. 589] small, e.g., the first—on Hawaii, the thirteenth—Kalihi, on Oahu; or much too large, e.g., the fifteenth—with its six representatives. Schmitt pointed out that within the fifteenth district, in the Moiliili area, there was a higher proportion of persons of Japanese ancestry than in any census tract of the island, yet Waikiki, primarily concerned with tourist service, was the second highest among census tracts in percentage of Caucasian residents. Also, high-level professional, technical and managerial people tended to live in Waikiki or upper Manoa,[3] whereas operatives, laborers, clerical workers, middle and lower-middle income people lived in the central (Moiliili, etc.) area.

Mr. Schmitt stated that the fifth senatorial district likewise encompassed a highly heterogeneous area containing a multitude of Caucasian widows in the uplands area, and an overabundance of Filipino males in the seaward portion of the district. The twelfth representative district, therein,

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[2] The location of the residences of two of Honolulu's present total of ten senators is in this district.

[3] The residences of the three senators from the present fourth senatorial district showed that all lived only a very short distance apart in the upper Manoa area of the 15th representative district.

had a very high proportion of persons of foreign birth or Asiatic ancestry, of the lower-middle socio-economic group.[4] [fol. 590] Schmitt's only other comment regarding the fifth senatorial district was that the boundary between the twelfth and thirteenth representative districts, i.e., within the proposed fifth senatorial district, had a very unfortunate location.

Schmitt also pointed out that within the seventh senatorial district were two clearly defined and geographically, economically and socially divided groups. In Palolo in the 16th representative district area were found the lower socio-economic laborers, operatives, and clerical workers, and in the Waialae-Kahala and Aina Haina areas were the highly professional and managerial class. In the latter area the median annual family income in 1959 was almost $16,000, whereas in Palolo it was $3,000.

From the committee reports and the testimony of Senator Takahashi, it is obvious that the legislature gave sparse, if any, consideration of any of the facts or factors pointed out by Mr. Schmitt, in devising its scheme of multi-member senatorial districts for Oahu.

Although we initially determined that the house of representatives was not unconstitutionally apportioned, by that decision we did not say that those representative districts had been perfectly laid out. We agree with Mr. Schmitt that, compared to the makeup of all other representative districts in the State, the 15th is too large.

There can be no truly representative government without a system of apportionment which provides potentially equal representation to the divergent factors incorporated within the body politic. Our own representative form of government demands checks and balances, devices and procedures to channel the many and diverse interests of the people into the making of a stream of legislation that

[4] Similarly, three senators from the fifth district likewise lived a short distance from each other in the twelfth representative district.

[fol. 591] produces for each person in that state the maximum beneficence possible. Methods of securing this desired objective were pointed out in *Reynolds* v. *Sims, supra,* at 576-77:

> "Different constituencies can be represented in the two houses. One body could be composed of single-member districts while the other could have at least some multi-member districts. The length of terms of the legislators in the separate bodies could differ. The numerical size of the two bodies could be made to differ, even significantly, and the geographical size of districts from which legislators are elected could also be made to differ. And apportionment in one house could be arranged so as to balance off minor inequities in the representation of certain areas in the other house. In summary, these and other factors could be, and are presently in many States, utilized to engender differing complexions and collective attitudes in the two bodies of a state legislature, although both are apportioned substantially on a population basis."

In reapportioning and redistricting the senate, both houses overlooked the fact that, to be valid, the makeup of the senate must positively complement the makeup of the house, to provide the vital equality of voter representation. Both houses of the legislature seemingly forgot that the schemes of districting *each* house, when conjoined, must offer compensating advantages to the voters—not only to those voters within each representative district, be it senate or house, but to all voters throughout the State. While there perforce must be some overlap of representation with the several senate and house districts, that overlap must not be such as to concentrate and intensify the voting power of a single senatorial-representative district to the point that the voters therein have a built-in disproportionate representational advantage over any other voters of the State.

If the achievement of this goal is even to be approached, there should not be any monolithic political units of representation in that all-inclusive system of apportionment. Unless, within any single geographically defined political area or unit, there is a meaningful and substantial differ- [fol. 592] ence in the composition of that body of electors therein, whose combined votes elect a senator, from that body whose combined votes elect a member of the house, then the demanded differing complexions and collective attitudes are lost, the necessary cross checking and resulting balance is absent, and the majorities therein are given a disproportional monolithic command, not only within the narrow political unit, but also within the legislative bodies. Such artificially concentrated political power negates any notion of equality of representation for the minorities entrapped therein, as well as for all other electors of the State outside such a monolithic political unit.

> "However complicated or sophisticated an apportionment scheme might be, it cannot, consistent with the Equal Protection Clause, result in a significant undervaluation of the weight of the votes of certain of a State's citizens merely because of where they happen to reside." *WMCA* v. *Lomenzo,* 377 U.S. 633, 653.

The Hawaiian legislature, whether innocently or designedly, has, nevertheless, built just such monoliths into its reapportionment scheme.

In its effort to achieve its objective of multi-member (three and four) senatorial districts in Honolulu, the legislature made the boundaries of the third senatorial district and the eighth representative district one and the same. Thus from *one* political and geographical unit would be elected four representatives and three senators—seven members of the legislature all responsible to and representing exactly the same constituency! Similarly, the sixth senatorial district was fashioned almost entirely from the fifteenth representative district, with the result that from

the fifteenth representative unit, i.e., from the dominant three-fourths of the voting population of that senatorial district, would come six representatives and four senators. [fol. 593] (31,302 of the senatorial district's total of 40,629 voters reside in the fifteenth representative district.)

While it is a fundamental factor under the decisions of The Court, population is not the sole definitive measure for setting up either representative or senatorial districts. Compactness and contiguity of the territory are admittedly also factors, but community of interests, community of problems, socio-economic status, political and racial factors—each and all must be considered, and not only must the electoral districts be laid out with the totality of those factors having been taken into consideration, but even more, the sum total of all of the districting must result in substantial equality of meaningful representation to each and all of the voters of the State. "(A)ll who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income and wherever their home may be in that geographical unit." *Gray* v. *Sanders,* 372 U.S. 368, 379. As indicated, not only was there no totality of consideration of the above factors in setting up the senatorial districts on Oahu, but there was even less totality of consideration of the factors of equal representation to all voters on Oahu and the rest of the State.

Here, the realistic political weight of the voters in both the third and sixth senatorial districts would far exceed the political weight of any voter in any other district, not only in Honolulu but in any other county of the State. It is patent to the court that both the house and the senate, in setting up the senatorial plan either failed or refused to recognize the effect that such a plan would have upon the basis for representation of the entire voting population. Both the Hawaiian senate and house ignored the [fol. 594] admonition of the Supreme Court:

> "(I)n reviewing a state legislative apportionment case this court must of necessity consider the challenged

> scheme *as a whole* in determining whether the particular State's apportionment plan, in its entirety, meets federal constitutional requisites. It is simply impossible to decide upon the validity of the apportionment of one house of a bicameral legislature in the abstract, without also evaluating the actual scheme of representation employed with respect to the other house. Rather, the proper, and indeed indispensable, subject for judicial focus in a legislative apportionment controversy is the overall representation accorded to the State's voters, in both houses of a bicameral state legislature." *Maryland Committee* v. *Tawes,* 377 U. S. 656, 673. (Emphasis added.)

This court heretofore said that the house was not unconstitutionally apportioned. This court indicated the means by which the senate could be apportioned to give to every voter the equal protection and equal representation that he is entitled to without disturbing the makeup of the house, but because both houses failed to look at the political scene in its totality and instead viewed the reapportionment scheme of the senate as if it were something that could be fashioned without consideration of its tight juxtaposition to the house of representatives, each house of the legislature jointly and separately took such a myopic view of the political problem involved, that they failed to see and anticipate the overall result of arbitrarily joining their independently constructed senatorial plan with the existing representative scheme.[5] As indicated, both houses failed to heed the words of the Supreme Court, as well as any of the red lights this court had flashed. Both houses failed to heed the advice of the Attorney

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[5]As foretold in *Fortson* v. *Dorsey,* 379 U. S. —— (1965) "it might well be that, designedly or otherwise, a multi-member constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population."

General of the State of Hawaii, and the end result, based as it is upon reasons which fall very, very short of justifying the resultant multi-member districting of both houses, [fol. 595] fails to give to each and every voter of the State of Hawaii the fundamental equality of representation to which each is entitled under the Fourteenth Amendment.

Even if the above, alone, were not enough to render the proposed scheme invalid, it is manifest to this court that the legislature's adamant insistence on three and four-member senatorial districting was the conscious or unconscious—though not unnatural—reluctance of the affected senators to carve out single-member districts which thereafter would in all probability result in a political duel-to-the-death with a fellow and neighbor senator. To have cross-cut any of the Honolulu's eighth, twelfth or fifteenth representative districts in order to mark out single-member senatorial districts would, with practical certainty, have left two or three present incumbents to compete head on for a single senatorial seat.

Likewise, the shift on Hawaii from the double, 2-1 senator district scheme, tentatively adopted on March 18th, to the single 3-senator district in the instant plan, was an unmistakable application to East Hawaii's incumbent senators of that same factor of political self-preservation implanted into the Honolulu districting scheme.[6]

[fol. 596] This court finds that the present multi-member district scheme of senatorial reapportionment resulted, in a material part at least, from gerrymandering.

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[6] "(I)n the absence of any reasonable justification (historical or otherwise), such districting (creation of single-member and multi-member districts) might be the result of gerrymandering for partisan advantage and, in that event, would be arbitrary and capricious. In the light of the constitutional pitfalls inherent in such a districting scheme, it would be more prudent to approach the matter of apportionment by setting up single-member districts unless valid and compelling reasons exist which require the creation of some multi-member districts." *Butcher* v. *Bloom*, 203 A.2d 556, 573.

We find the proposed plan does not meet the test of equality of representation set down by our Supreme Court and is invalid. We therefore do not approve the plan.

Circuitous or expensive as it may be, the route set out by the Constitution of this State, viz., by way of a constitutional convention, must now be followed. Inasmuch as the plan set forth in H.B. 987 cannot be and is not approved by this court, It Is Therefore Ordered:

(1) The stay order of this court dated April 19, 1965, is rescinded, effective forthwith; and

(2) As indicated in our Final Order of March 19, 1965, item 4 on pages 19-20, and item 6 on pages 20-21 of the Decision and Order of this court dated February 17, 1965, be and they are hereby automatically reinstated and now remain and shall continue in full force and effect until further order of this court.

As may be noted, this court has not herein discussed H.B. 773. We are advised that it was able to pass the senate by but the barest majority, 13-12, far short of the two-thirds demanded by the State constitution for the adoption of a proposed constitutional amendment. The same also has not yet lain on the desk of the Governor for the ten days prior to final adoption, as provided by the constitution.[7] Therefore, procedurally, the same has [fol. 597] not yet been submitted to us. *Wright* v. *Rockefeller,* 376 U.S. 52, 58. Even if it were, nevertheless, in view of our decision on the provisional plan, H.B. 987, we would not and now do not find it necessary to consider

[7] In order to move the reapportionment problem with the greatest celerity, this court, nevertheless, had advised all parties that a provisional plan of reapportionment could be submitted to this court and a hearing had thereon immediately after the same was passed by the legislature and before the ten-day period during which a proposed amendment must lie on the desk of the Governor before the same can be adopted and passed. The instant hearing therefore was solely upon the matter of the proposed provisional plan.

the validity of the proposed amendment, H.B. 773, or the question proposed by H.B. 986.

This court continues to retain jurisdiction of this action for all purposes.

This decision shall take effect forthwith.

Dated: Honolulu, Hawaii, this 28th day of April, 1965.

Gilbert H. Jertberg, Circuit Judge, William T. Beeks, District Judge, Martin Pence, District Judge.

[fol. 612] [File endorsement omitted]

[fol. 613]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

Civil No. 2308

[Title omitted]

NOTICE OF APPEAL OF JOHN A. BURNS, GOVERNOR OF HAWAII, TO THE SUPREME COURT OF THE UNITED STATES—Filed May 3, 1965

I. Notice is hereby given that John A. Burns, Governor of Hawaii, an intervenor-plaintiff above named, hereby appeals to the Supreme Court of the United States from the order of February 17, 1965, entered on April 9, 1965, denying injunctive relief as prayed for by intervenor-plaintiff, and enjoining the legislators of the Third Legislature, General Session, State of Hawaii, from enacting any legislation until reapportionment legislation satisfactory to the court has been enacted, and also from the order of April 28, 1965, entered on April 28, 1965, reinstating the injunction against said legislators.

This appeal is taken pursuant to 28 U.S.C.A. section 1253.

[fol. 614] II. The clerk will please prepare a transcript of the complete record in this cause for transmission to the Clerk of the Supreme Court of the United States, including, but not limiting said transcript to, all papers filed by the parties herein.

III. The following questions are presented by this appeal:

1. Did the district court, in seeking to compel the legislature of the State of Hawaii to enact reapportionment legislation in compliance with the Equal Protection Clause of the 14th Amendment to the Federal Constitution, abuse its discretion through the employment of excessive and drastic measures, to wit, the prohibition of enactment by the legislature of legislation essential for the normal operation by State and municipal offices in Hawaii and essential for the continuation of programs necessary for the health and welfare of the people of Hawaii until such time as reapportionment legislation had been passed to the satisfaction of the district court?

2. Whether the apportionment of the senate and of the house of representatives of the Hawaii State legislature, considered as a whole, is inseverable, so that the invalidity of the apportionment of the senate results in the invalidity of the house of representatives as well.

3. Whether the Hawaii legislature has the power to enact at least temporary legislation reapportioning the legislature pending the adoption of an amendment to the Hawaii Constitution comporting with Federal constitutional requirements.

[fol. 615] 4. Whether the Equal Protection Clause requires that the apportionment of delegates to a constitutional convention called for the purpose of amending the Hawaii Constitution be substantially on a population basis.

5. Whether the Equal Protection Clause requires that both houses of the Hawaii legislature consist of representatives from single-member districts, unless there are shown valid and compelling reasons to justify some multi-member districts.

6. Whether the Equal Protection Clause requires that no later than at the 1966 general election, amendments to the Hawaii Constitution providing for a permanent reapportionment plan shall be submitted to the electorate for ratification.

7. Whether the apportionment scheme for the house of representatives of the Hawaii legislature results in invidious discrimination in favor of larger multi-member districts and against single-member and smaller multi-member districts.

8. Whether registered voters is a valid basis for the apportionment of seats to the Hawaii legislature.

Dated: Honolulu, Hawaii, May 3, 1965.

Bert T. Kobayashi, Attorney General, State of Hawaii, Attorney for John A. Burns, Intervenor-Plaintiff, Iolani Palace Grounds, Honolulu, Hawaii 96813.

[fol. 616] Proof of Service (omitted in printing).

[fol. 620] [File endorsement omitted]

[fol. 621]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

Civil No. 2308

[Title omitted]

MOTION TO SUSPEND INJUNCTION AND FOR STAY OF ORDER PENDING APPEAL—Filed May 7, 1965

Upon the affidavit of The Honorable John A. Burns, Governor of Hawaii, attached hereto, and the proceedings heretofore had herein, John A. Burns, Governor of Hawaii, one of the intervenor-plaintiffs above named, moves this Honorable Court for an order suspending the injunction heretofore entered against all members of the legislature, intervenor parties herein, and staying the order entered April 28, 1965, pending the hearing and determination of the appeal of said John A. Burns to the Supreme Court of the United States from the orders of this Honorable Court entered on April 9, 1965 and April 28, 1965, and for such other and further relief as to this Honorable Court may be just.

Dated: Honolulu, Hawaii, May 6, 1965.

Bert T. Kobayashi, Attorney General, State of Hawaii, Attorney for John A. Burns, Intervenor-Plaintiff.

[fol. 622]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

Civil No. 2308

[Title omitted]

ATTACHMENT TO MOTION

AFFIDAVIT OF JOHN A. BURNS—Filed May 7, 1965

State of Hawaii,
City and County of Honolulu, ss.

John A. Burns, being first duly sworn, deposes and says:

1. That he is Governor of the State of Hawaii;

2. That he is an intervenor-plaintiff in this cause;

3. By order dated February 17, 1965 (entered April 9, 1965) this Court enjoined the legislature from taking final action upon any legislation until it shall first have enacted legislation providing (a) for submission to the electorate at a special election to be held not later than August 1, 1965, the question: "Shall there be a convention to propose a revision of or amendments to the constitution?", and for [fol. 623] any and all acts required by law to implement such legislation, pursuant to Article XV of the Hawaii State Constitution; (b) that if the vote be in the constitutional affirmative, then a special election be held not later than September 15, 1965 to elect delegates to the convention in the manner provided in the Constitution; (c) that the convention convene not later than October 15, 1965; and (d) that it conclude its deliberation in time to submit its proposed constitutional amendments to the electorate of Hawaii at a special election to be held not later than January 30, 1966, including (but not limiting the convention thereto) provisions for reapportioning the senate of Hawaii on a constitutionally valid basis.

By order dated March 9, 1965 this Court amended and altered the order, and by such amendment and alteration, in lieu of the February 17, 1965 injunction, it enjoined the legislature from taking final action on any legislation until it had first enacted (a) a provisional plan reapportioning the senate, (b) a constitutional amendment embodying such senatorial reapportionment, and (c) submission to the people at the 1966 general election the question: "Shall there be a convention to propose a revision of or amendments to the constitution?". Pursuant thereto the legislature submitted to this Court such a reapportionment plan on April 14, 1965. On April 19, 1965 the Court stayed the injunction, so that the legislature could take final action on legislation. By decision and order dated April 28, 1965, this Court rejected the senate reapportionment plan submitted by the legislature and reinstated the injunction against and direction to the legislature contained in the order dated February 17, 1965, *supra*.

[fol. 624] 4. The Court imposed its injunction on the 58th legislative day, with only two days left of the 60-day general session. All legislation pending when the injunction was imposed would, without exception, have died as of midnight April 30, 1965. Such legislation included absolutely essential bills, as indicated hereinafter, among them the operating budget bill, without which State government operations would grind to a halt on July 1, 1965. This would have resulted in utter waste of the monumental legislative work done on complex legislation and endangering of public health and welfare, as well as stoppage of the operation of government. The Governor of necessity had to extend the session and he has extended it for seven days, with the attendant expense and imposition upon the taxpayers.

However, 60 days of the regular session and nearly all of the extended session have passed. Yet the legislature has been unable to enact legislation for a constitutional convention in accordance with the order of this Court be-

cause of differences of opinion among its members. It appears that a majority of the legislature are opposed to the calling of a convention, not only because of the expense and the lengthy and circuitous procedure involved but also because of the not unwarranted apprehension that a convention may open the Pandora's box of wholesale revision of the Constitution which is uncalled for at this time.* Senate Bill No. 475, S.D. 1, calling for a constitutional convention, was defeated on third reading in the senate on May 5, 1965. There is no reasonable prospect that the legislature will be able to enact the required legislation hereafter so as to warrant any further extension of the session, and accordingly there is no assurance that the Governor will extend the session further. Therefore it appears inevitable that there will be a complete failure of resolution of the problem—i.e. no convention legislation and a loss [fol. 625] and waste of so much of the herculean and nearly complete legislative work** on essential measures accomplished during the preceding 57 days of the session and during extensive pre-session hearings, to the detriment of the health and welfare of the people—unless the Court grants a stay.

A stay will save legislation essential for continuation of operations of State government and of programs necessary for the health and welfare of the people; it will remove the probability of an unnecessary test of State legislative and Federal judicial authority; it will allow an orderly and full review by the U. S. Supreme Court and will provide an opportunity for a calmer, more dispassionate resolution of the problem before the 1966 elections on the basis of more definite official guidelines—either by legislative ac-

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* The State Constitution has been in effect only since August 21, 1959. It is the product of considered and dedicated deliberation and should be given an opportunity for fuller operation. The legislature cannot restrict the subject matter of a constitutional convention.

** See paragraph 7, *infra*.

tion at a special or regular session* or by judicial action on the basis of plans submitted to the Court or otherwise.

5. That some of the parties, among them the legislators intervenors-defendants and the affiant, believe that they should have the benefit of the United States Supreme Court's passing upon certain determinations of law made by this Honorable Court, with which they are in genuine and honest disagreement. If the injunction is not stayed and in the unlikely event that a convention is convened which proposes constitutional amendments for reapportionment, the U. S. Supreme Court may deem it unnecessary to review the matter and the opportunity for review would be irretrievably lost. Moreover, if this Honorable Court [fol. 626] were in error in any of its determinations, if the opportunity for review were lost as aforesaid, then (a) the people of the State would have been needlessly put to the expense and circuity of reapportionment by constitutional convention and/or (b) the convention might be proceeding on erroneous assumptions of law with the result that the plan devised by the convention may be subject to challenge and ultimately be declared invalid. A stay of the injunction pending review on appeal would facilitate fair and orderly review of all appealable issues, without jeopardizing the enactment of laws necessary for the operation of government and for the health and welfare of the people.

6. By its decision of February 17, 1965, this Court declared that the State senate is malapportioned, but that

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* Affiant does not discount further legislative action notwithstanding the failure of the legislature to enact valid reapportionment legislation heretofore, because he believes and respectfully submits that at least part of such failure has been due to a lack of sufficient, precise official guidelines and of judicial precedents relative to the situation in Hawaii, compounded by the fact that this Honorable Court had found and declared the State house of representatives not to be improperly apportioned, and such declaration carried with it confusing implications that were not completely unwarranted.

the State house of representatives is not. By its amended order of March 9, 1965, this Court directed the legislature to reapportion the *senate* for the 1966 elections and to embody such *senatorial* reapportionment in a constitutional amendment.

This led to the not unexpected inference by legislators that the apportionment of the house of representatives need not or could not be altered under the terms of the order of the Court and that such apportionment was constitutionally sound, and so they focused their attention solely on the apportionment of the senate and adopted a senatorial reapportionment similar to that of the house of representatives. Furthermore, historically the people of Hawaii have experienced only multi-member district representation that is based not on democratic considerations but rather, is accounted for by the feudalistic background of the history of government in the Islands. There is an absence of familiarity with single-member districting based [fol. 627] on demographic and sociological considerations referred to by the Court in its April 28, 1965 decision.

There was a lack of clear, definitive official guidelines for the legislature to follow in the February 17 or March 9, 1965 orders of the Court, and the legislature confined itself to factors, such as equality of population per senator and selection of established lines as district boundaries. In view of the foregoing, the legislature's reapportionment plan submitted on April 14, 1965 was not unexpected.

7. That the injunction is preventing the enactment of legislation essential for normal operation by State and municipal offices in Hawaii and essential for continuation of programs necessary for the health and welfare of the people of Hawaii, as well as for needed new facilities. Among such bills are:

A. The operating budget for the fiscal year 1965-1966, necessary for operation of departments of the State government, including compensation of all officers and employees, and payment of costs of supplies

equipment. Under the State Constitution failure of passage of this bill may mean that there will be no legal authorization to expend any funds for State government operations on and after July 1, 1965, the date of commencement of the new fiscal year. The bill (H. B. No. 144, H. D. 1, S. D. 1, C. D. 1) which has been reported out by the senate-house conference committee and adopted by the house of representatives, needs only adoption by the senate in order to become law. Said bill appropriates the amounts indicated for the following departments of the State government:

[fol. 628]

Department of Education	$53,279,160
University of Hawaii Included is an appropriation for establishment of a State-wide educational television system.	21,049,728
Department of Agriculture	2,125,211
Department of Land and Natural Resources	2,612,713
Department of Planning and Economic Development Included herein are appropriations for the foreign trade zone and promotion of tourism.	2,089,440
Department of Transportation	184,849
Department of Defense	965,535
Department of Health	10,824,245
Courts	3,045,819
Department of Labor and Industrial Relations	794,436

Department of Social Services This department administers the prison system, public housing, the public welfare program, juvenile detention and rehabilitation, aid to the blind, disabled and aged.	$14,641,649
Department of Accounting and General Services	2,925,435
Department of the Attorney General	564,422
Department of Budget and Finance Included are $15,586,160 for payment of principal and interest on State bonds and $8,525,930 for the government's payment to the public employees' retirement system.	29,685,641
Governor's Office	808,668
Lieutenant Governor's Office	159,953
Department of Personnel Services	409,389
[fol. 629] Department of Regulatory Agencies Included are the bank examination program, insurance regulation, the public utilities Commission, professional and vocational licensing program.	1,072,238
Department of Taxation	2,765,047
Subsidies to quasi-public tuberculosis hospitals (Kula Sanatorium, Maui; Leahi Hospital, Oahu; Hilo Hospital, Hawaii; Samuel Mahelona Memorial Hospital, Kauai)	3,556,279
Other subsidies and appropriations for general hospitals and veterans' cemeteries	422,800

Failure of passage of the operating budget bill will jeopardize receipt of federal funds for the following federal programs, among others: manpower development and training, the science, mathematics and foreign languages program, area redevelopment, civil defense, vocational rehabilitation, old age survivors' insurance, the Hansen's disease program.

B. The capital improvements program bill (S. B. No. 190, S. D. 2, H. D. 1). It authorizes capital expenditures totaling $171,416,771. The bill has received three readings in each house but because of disagreement between the houses as to certain amendments, the bill is now in conference. This amount includes $65,606,200 for highways, a large part of which consists of federal aid, which would be jeopardized if the bill is not passed. It also includes $11,788,104 for buildings and other facilities at schools and public libraries, and $3,284,500 for a new community college system.

[fol. 630] C. A bill to provide revenues for the above expenditures, including revision and reform of the tax system (S. B. No. 656, S. D. 2, H. D. 1). This bill has received three readings in each house, but because of disagreement between the houses as to certain amendments, the bill is now in conference.

D. Among other major bills are those providing for a new pay scale for teachers (H. B. No. 279, H. D. 2); establishing community mental health programs and programs on mental retardation (H. B. No. 99, H. D. 2, S. D. 1); overall revision and reform of laws relating to public education (H. B. No. 49, H. D. 1, S. D. 1); expansion of research and programs on problems of the aged (H. B. No. 106, H. D. 1).

Existing circumstances and equitable considerations in the interests of the general welfare of the people of Hawaii

dictate that the Court should stay its injunction pending appeal to the U. S. Supreme Court.

For all of the foregoing reasons, affiant respectfully petitions this Court to stay its injunction against enactment of legislation.

Further affiant sayeth not.

John A. Burns

Subscribed and sworn to before me this 6th day of May, 1965.

(Seal)

Rose U. Okinishi, Notary Public, First Judicial Circuit, State of Hawaii. My commission expires March 3, 1968.

[fol. 631]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

Civil No. 2308

[Title omitted]

APPLICATION TO FIX TIME FOR HEARING AND ORDER THEREON —Filed May 7, 1965

John A. Burns, Governor of Hawaii, intervenor-plaintiff, hereby applies for an order to fix Monday, May 10, 1965, 2:00 P.M., or as soon thereafter as the Court may fix, as the date for the hearing of the Motion to Suspend Injunction and for Stay of Order Pending Appeal. This application is brought under Rule 6(d) to fix the time of hearing and waiver of five days' notice.

Dated: Honolulu, Hawaii, May 6, 1965.

Bert T. Kobayashi, Attorney General, State of Hawaii.

It Is So Ordered:

Martin Pence, United States District Judge.

[fol. 632]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

Civil No. 2308

NOTICE OF MOTION—Filed May 7, 1965

To:

Charles M. Tonaki, Esq., Barry J. Rubin, Esq., 1201 First National Bank Building, Honolulu, Hawaii (Counsel for Plaintiffs).

Masaji Marumoto, Esq., 235 Queen Street, Honolulu, Hawaii (Associate Counsel for Plaintiffs).

Robert G. Dodge, Esq., Trustco Building, Honolulu, Hawaii (Counsel for Defendant William S. Richardson).

John J. Hulten, The Senate, State of Hawaii, Iolani Palace Grounds, Honolulu, Hawaii.

George R. Ariyoshi, The Senate, State of Hawaii, Iolani Palace Grounds, Honolulu, Hawaii.

O. Vincent Esposito, The Senate, State of Hawaii, Iolani Palace Grounds, Honolulu, Hawaii.

Mitsuyuki Kido, The Senate, State of Hawaii, Iolani Palace Grounds, Honolulu, Hawaii.

Taylor A. Pryor, The Senate, State of Hawaii, Iolani Palace Grounds, Honolulu, Hawaii.

Sakae Takahashi, The Senate, State of Hawaii, Iolani Palace Grounds, Honolulu, Hawaii.

Vincent H. Yano, The Senate, State of Hawaii, Iolani Palace Grounds, Honolulu, Hawaii.

George M. Okano, House of Representatives, State of Hawaii, Iolani Palace Grounds, Honolulu, Hawaii.

[fol. 633] Robert Kimura, Esq., Office of the Senate Majority Attorneys, Schuman Building, Honolulu, Hawaii (Counsel for Nelson K. Doi, et al., intervenors-defendants).

James T. Funaki, Esq., Office of the House Majority Attorneys, Schuman Building, Honolulu, Hawaii (Counsel for Elmer F. Cravalho, et al., intervenors-defendants).

William T. Furtado, House of Representatives, Iolani Palace Grounds, Honolulu, Hawaii.

Joseph R. Garcia, Jr., House of Representatives, Iolani Palace Grounds, Honolulu, Hawaii.

Takeshi Kudo, House of Representatives, Iolani Palace Grounds, Honolulu, Hawaii.

Frank W. C. Loo, House of Representatives, Iolani Palace Grounds, Honolulu, Hawaii.

George W. T. Loo, House of Representatives, Iolani Palace Grounds, Honolulu, Hawaii.

Toshi Ansai, The Senate, State of Hawaii, Iolani Palace Grounds, Honolulu, Hawaii.

John G. Duarte, The Senate, State of Hawaii, Iolani Palace Grounds, Honolulu, Hawaii.

James F. Fleming, The Senate, State of Hawaii, Iolani Palace Grounds, Honolulu, Hawaii.

William H. Hill, The Senate, State of Hawaii, Iolani Palace Grounds, Honolulu, Hawaii.

[fol. 634] Bernard G. Kinney, The Senate, State of Hawaii, Iolani Palace Grounds, Honolulu, Hawaii.

Noboru Miyake, The Senate, State of Hawaii, Iolani Palace Grounds, Honolulu, Hawaii.

Clinton I. Shiraishi, The Senate, State of Hawaii, Iolani Palace Grounds, Honolulu, Hawaii.

Julian R. Yates, Sr., The Senate, State of Hawaii, Iolani Palace Grounds, Honolulu, Hawaii.

Please Take Notice that the undersigned will bring the foregoing Motion to Suspend Injunction and for Stay of Order Pending Appeal on for hearing before this Court on Monday, the 10th day of May, 1965, at 2:00 p.m., or as soon thereafter as the Court may fix.

Dated: Honolulu, Hawaii, May 6, 1965.

Bert T. Kobayashi, Attorney General, State of Hawaii.

[fol. 635] Certificate of Service (omitted in printing).

[fol. 641] [File endorsement omitted]

[fol. 642]

In the United States District Court

For the District of Hawaii

Civil Action No. 2308

[Title omitted]

Notice of Appeal of Hawaii State Senators Kazuhisa Abe, et al. to the Supreme Court of the United States—Filed May 7, 1965

I

Notice is hereby given that the Hawaii State Senators, Kazuhisa Abe, George R. Ariyoshi, Nelson K. Doi, O. Vincent Esposito, William E. Fernandes, John J. Hulten, Anna F. Kahanamoku, Mitsuyuki Kido, Benjamin Menor, Taylor A. Pryor, Sakae Takahashi, David K. Trask, Jr., John T. Ushijima, Vincent H. Yano, and Nadao Yoshinaga parties herein, hereby appeal to the Supreme Court of the United States from the Decision and Order of February 17, 1965, entered on April 9, 1965, and from the Decision and Order

on Hawaii's Senate Reapportionment Plan of April 14, 1965, entered in this action on April 28, 1965.

This appeal is taken pursuant to 28 U.S.C.A., Section 1253.

[fol. 643]

II

This appeal is being taken concurrently with the appeal of John A. Burns, Governor of Hawaii, Intervenor-Plaintiff, herein. The transcript of record on appeal of the Intervenor-Plaintiff is the same as that required by this appeal. The Clerk is requested to transmit this transcript to the Clerk of the Supreme Court of the United States.

III

The following questions are presented by this appeal:

(1) Did the District Court, in seeking to compel the legislature of the State of Hawaii to enact reapportionment legislation in compliance with the Equal Protection Clause of the Fourteenth Amendment, abuse its discretion through the employment of excessive and drastic measures, to wit, the prohibition of enactment by the legislature of legislation essential to the normal operation by state and municipal government offices in Hawaii and essential for the continuation of programs necessary for the health and welfare of the people of Hawaii until such time as reapportionment legislation had been passed to the satisfaction of the District Court?

(2) Was the District Court, after assuming the task of approving a legislative reapportionment plan, bound to construe such a plan on the basis of its "constitutionality" as contrasted from its "desirability" to the Court?

(3) Did the District Court, in holding the Senate Reapportionment Plan presented in H. B. No. 987, S. D. 1, C. D. 1, did not meet the test of equality of representation, depart from constitutional standards in construing the plan?

[fol. 645] (4) Did the District Court commit error by not giving the plan a presumption of validity and by not placing the burden of proof upon the opponents of the said Senatorial Reapportionment Plan to specify the constitutional defects in such plan?

(5) Did the District Court act capriciously in finding that the said Senatorial Reapportionment Plan was a result of gerrymandering, where no evidence was submitted by any party to the action that the plan was so motivated?

(6) Was the District Court in error in concluding that the incumbent senators in at least three proposed senatorial districts, by the mere fact of their close residential proximity, were motivated by political self-preservation in favoring a plan incorporating multi-member districts over single-member districts?

(7) Are multi-member representative districts per se unconstitutional?

(8) If the above question is answered in the negative:

a. Should only one house of a bicameral legislature be justified in having multi-member districts?

b. Given the desirability of equal representation, what if any constitutional justification is there for allowing multi-member representative districts in one house of a bicameral legislature while not allowing it in the other?

(9) Where a constitutionally sound apportionment plan has been enacted by the legislature, should it be struck down because the court subsequently finds that some factors were not considered in its structuring?

(10) Was the District Court, having found that the legislature considered the number of registered voters, geographic compactness and contiguity, and historic and [fol. 646] established political boundaries in its enactment of H. B. No. 987, S. D. 1, C. D. 1, in error in its Decision and Order on Hawaii's Senate Reapportionment Plan of

April 14, 1965, entered on April 28, 1965, in stating that factors such as community of interests, community of problems, socio-economic status, political and racial factors must each and all be considered and integrated into the structuring of the proposed senatorial districts?

(11) Does the equal protection clause of the Fourteenth Amendment of the United States Constitution prohibit both houses of a bicameral legislature from having multi-member districts where each vote is given substantially equal weight throughout the state and where such multi-member district can be justified?

(12) Does the fact that the District Court ruled by its Decision and Order of February 17, 1965, that the multi-member House of Representatives of the State of Hawaii was constitutionally apportioned, preclude consideration of an apportionment plan to include multi-member districts for the Senate of the State of Hawaii, where the District Court in the same Decision and Order set forth guidelines for a constitutional convention and suggested that the convention consider "whether it is better to have one or both houses of the legislature composed of single-member representative districts or to have and justify one or both houses composed in whole or in part of multi-member or floterial districts."?

(13) Were the conditions and sanctions imposed by the District Court for the reapportionment of the legislature unreasonable and arbitrary so as to constitute an invasion of the legislative function and an abuse of discretion by the Court?

[fol. 647] Dated at Honolulu, Hawaii, this 6th day of May, 1965.

Robert Kimura, Attorney for the Hawaii State Senators Kazuhisa Abe, et al, Office of the Senate Majority Attorney, Schuman Building, Honolulu, Hawaii.

[fol. 648] Proof of Service (omitted in printing).

[fol. 651] [File endorsement omitted]

[fol. 652]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

Civil No. 2308

[Title omitted]

NOTICE OF APPEAL OF ELMER F. CRAVALHO, ET AL. TO THE SUPREME COURT OF THE UNITED STATES—Filed May 7, 1965

I

Notice is hereby given that Elmer F. Cravalho, et al., Intervenors-Defendants above named, hereby appeal to the Supreme Court of the United States from the Decision and Order, dated February 17, 1965, and entered in this action on April 9, 1965, enjoining the legislators of the Third Legislature of the State of Hawaii, General Session of 1965, from enacting any legislation until reapportionment legislation satisfactory to the court has been enacted, and also from the Decision and Order on Hawaii's Senate Reapportionment Plan of April 14, 1965, dated and entered in this action on April 28, 1965, reinstating the injunction against said legislators.

This appeal is taken pursuant to 28 U.S.C.A., Section 1253.

[fol. 653] II

John A. Burns, Governor of Hawaii, Intervenor-Plaintiff above named, has taken an appeal in this cause heretofore on May 3, 1965. The transcript of record on the appeal herein shall be the same as the transcript of record designated in the notice of appeal of John A. Burns, Intervenor-Plaintiff above named.

The clerk will please prepare the same transcript of record in this cause, for transmission to the Clerk of the Supreme Court of the United States.

III

The following questions are presented by this appeal:

1. Did the District Court, in seeking to compel the legislature of the State of Hawaii to enact reapportionment legislation in compliance with the Equal Protection Clause of the 14th Amendment of the Constitution of the United States, abuse its discretion through the employment of excessive and drastic measures, to wit: the prohibition of enactment by the legislature of legislation essential for the operation of state and county governments in Hawaii and essential for the continuation of programs necessary for the health and welfare of the people of Hawaii until such time as reapportionment legislation has been passed to the satisfaction of the District Court?

2. Does the reapportionment plan for the Hawaii Senate, H. B. No. 987, S. D. 1, C. D. 1, which the legislature of the State of Hawaii submitted to the District Court on April 14, 1965, pursuant to the order of the District Court, violate the Equal Protection Clause of the 14th Amendment of the Constitution of the United States?

[fol. 654] 3. Does the Equal Protection Clause of the 14th Amendment of the Constitution of the United States necessarily require that the Hawaii Senate be apportioned in accordance with a rule of single member districts where the House of Representatives, with single member and multi-member districts, has been found to be constitutionally apportioned?

4. Where the legislature of the State of Hawaii has constructed senatorial districts with substantial equality of population for each district in accord with the number of senators to be elected from the respective senatorial district, does the legislature have the burden of justifying

that such reapportionment plan does not operate to minimize or cancel out the voting strength of political, social, economic, or racial elements of the voting population, or do the opponents of such plan have the burden of demonstrating such invidious results?

5. Where the legislature of the State of Hawaii has constructed senatorial districts with substantial equality of population for each district in accord with the number of senators to be elected from the respective senatorial district, and where the House of Representatives, with single member and multi-member districts, has been found to be constitutionally apportioned, does the legislature of the State of Hawaii have the burden of justification that the two houses complement each other so that there is no violation of the United States Constitution, or do the opponents of such reapportionment plan have the burden of demonstrating that the two house fail to complement each other to such an extent that there is a violation of the United States Constitution?

[fol. 655] 6. Where the legislature of the State of Hawaii has constructed senatorial districts with substantial equality of population for each district in accord with the number of senators to be elected from the respective senatorial district, was it necessary for the legislature to have considered ethnic, political, industrial, economic, social, occupational factors, and community of interests and problems in the formation of such districts, in order to comport with the requirements of the Equal Protection Clause of the 14th Amendment of the Constitution of the United States?

7. Does the fact that the geographical boundaries of certain districts of one house of a bicameral legislature of the State of Hawaii are identical to, or coincide to a great degree with, the geographical boundaries of certain districts of the other house violate the Equal Protection Clause of the 14th Amendment to the Constitution of the United States?

8. Does the weight of the votes of the citizens in districts, where the geographical boundaries for both senatorial and representative districts are identical or coincide to a great degree, far exceed the weight of votes of citizens in districts where the geographical boundaries for senatorial and representative districts do not coincide, so that there is a violation of the Equal Protection Clause of the 14th Amendment of the Constitution of the United States?

9. Whether the Equal Protection Clause requires that no later than at the 1966 general election, amendments to the Hawaii Constitution providing for a permanent reapportionment plan shall be submitted to the electorate for ratification?

[fol. 656] 10. Where certain provisions of the Hawaii Constitution relating to the apportionment of the Hawaii Senate are invalid, does the legislature of the State of Hawaii have the authority to enact at least provisional reapportionment legislation relating to the Hawaii Senate, pending the adoption of valid amendments to the Hawaii Constitution providing for the reapportionment of the Hawaii Senate in accord with the United States Constitution?

Dated: Honolulu, Hawaii, May 7, 1965.

James T. Funaki, Attorney for Elmer F. Cravalho, et al., House of Representatives, Iolani Palace Grounds, Honolulu, Hawaii.

[fol. 657] Proof of Service (omitted in printing).

[fol. 666]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

Civil No. 2308

HENRIETTA DAVIDSON HOLT, et al., Plaintiffs,

vs.

WILLIAM S. RICHARDSON, Lieutenant Governor of Hawaii, Defendant,

JOHN J. HULTEN, *et al.*, and JOHN A. BURNS, Governor of Hawaii, Intervenors-Plaintiffs,

NELSON K. DOI, *et al.*, and ELMER F. CRAVALHO, et al., Intervenors-Defendants.

RULING ON MOTION TO SUSPEND INJUNCTION AND FOR STAY OF ORDER PENDING APPEAL—May 11, 1965

This court has before it the motion of the Honorable John A. Burns, Governor of Hawaii, one of the intervenor-plaintiffs herein, that this court suspend the injunction heretofore entered against all members of the legislature, intervenor parties herein, and stay this court's order of April 28, 1965, pending the hearing and determination of the appeal of the Honorable John A. Burns to the Supreme Court of the United States from the orders of this court of April 9, 1965, and April 28, 1965. Honorable William S. Richardson, Lieutenant Governor of Hawaii and defendant herein, and Henrietta Davidson Holt, et al., plaintiffs herein, have also joined in the motion.

After full consideration of the affidavit of the Honorable John A. Burns as well as the record in this case, the motion is Denied.

[fol. 667] Dated: Honolulu, Hawaii, this 11th day of May, 1965.

Gilbert H. Jertberg, Circuit Judge, William T. Beeks, District Judge, Martin Pence, District Judge.

[File endorsement omitted]

[fol. 668]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

DOCKET ENTRIES

Civil Docket 2,308

TITLE OF CASE

HENRIETTA DAVIDSON HOLT, et al., Plaintiffs

vs.

WILLIAM S. RICHARDSON, Lt. Gov. of Hawaii, Defendant,

JOHN J. HULTEN, et al.,
Applicants for Intervention as Pltfs.

JOHN A. BURNS, Governor of Hawaii,
Applicant for Intervention as Pltf.

NELSON K. DOI, et al.,
Applicants for Intervention as Defts.

ELMER F. CRAVALHO, et al.,
Applicants for Intervention as Defts.

Basis of action: Federal Declaratory Judgment Act, 28 USC, §§2201, 2202; Reapportionment of Legislature, Hawaii.

ATTORNEYS

For Plaintiff: Charles M. Tonaki, Barry J. Rubin, Macaji Marumoto, Associate.

Intervenors Hulten, et al.; Bert Kobayashi, AG; Bertram T. Kanbara; Nobuki Kamida.

Intervenor Burns: Bert T. Kobayashi, AG.

For Defendant: Robert G. Dodge.

Intervenors Doi, et al.: Frank D. Padget 3/10/65.

Intervenors Cravalho, et al.: James Funaki.

3rd Legislature: Robert Kimura.

[fol. 669]

DATE	FILINGS—PROCEEDINGS
1964	
Aug. 13	COMPLAINT, SUMMONS, MOTION FOR PRELIMINARY INJUNCTION, AFFIDAVIT OF CARL J. GUNTERT and MEMORANDUM OF AUTHORITIES filed
	SUMMONS issued, certifying one copy for service
	ORDER FOR HEARING ON PRELIMINARY INJUNCTION filed
	U. S. Marshal's return filed—served
17	Notice of Motion to Intervene, Motion to Intervene as Plaintiffs, Complaint and Statement of Reasons and Authorities filed (Hulten and Okano)
18	Amendment to Exhibit B filed Certificate of Service filed
21	Answer filed

DATE 1964	FILINGS—PROCEEDINGS
Aug. 24	Notice of Motion to Intervene, Motion to Intervene as Plaintiff, Complaint in Intervention, and Statement of Reasons and Authorities filed (Burns)
	Application to Fix Time for Hearing, Motion to Intervene as Defendants, and Notice of Motion filed (Doi, et al.)
	Answer and Cross-Claim filed (Doi, et al.)
	Certificate of Service filed
	Notice of Motion to Intervene, Motion to Intervene, Answer, and Statement of Reasons and Authorities filed (Cravalho, et al.)
	Entering proceedings—no objections to Motions to Intervene by plaintiffs and defendant—motions to intervene granted—plaintiff's documents 1, 2, 2-A, 2-B, 2-C, 3 and 4, defendant's document A, Intervenor defendant's documents S-1, S-2, S-3 & S-4 marked for identification—Governor's document GO-1 and House documents H-1 and H-2 submitted for identification—statements by respective counsel—plaintiff ordered to submit Pretrial Order
25	Entering proceedings—motion to intervene by George Ariyoshi, et al. granted—plaintiff's wits: Robert Schmitt, Frank Takao and Robert Chang—plaintiff's exhibits 1, 2, 2-A, 2-B, 3 & 4 admitted in evidence—defendant's A admitted in evidence—case continued to 2:00 p.m. this day for further hearing—oral motion by Robert G. Dodge for denial of motion for preliminary injunction joined by Frank Padgett—case continued until 3:18 p.m.—argu-

DATE 1964	FILINGS—PROCEEDINGS
Aug. 25 (cont'd)	ment by Bertram T. Kanbara on behalf of Preliminary Injunction—argument by Dodge and Marumoto
26	Entering proceedings—Robert Schmitt recalled to testify—plaintiff's exhibits 5, 6, 6-A, 6-B, 6-C, 7, 8, 9, 10 and 11, Governor's exhibits 1 and 2, and Intervenor's S-1, S-2, S-3 and S-4 were admitted in evidence—argument on motion to dismiss motion for preliminary injunction by Rubin, Marumoto, Dodge and Padgett —case continued to 2:00 p.m. for preliminary injunction denied—trial date set for 1/11/65 —simultaneous briefs due 11/17/64—Reply to Simultaneous Briefs due 12/1/64 at 4:00 p.m.
Nov. 17	Brief on Behalf of Intervenors-Defendants Nelson K. Doi, et al. filed
	Brief of Intervenors-Defendants Elmer F. Cravalho, et al., filed
	Plaintiffs' Opening Brief filed
	Defendant's Brief filed
	Opening Brief filed (Int.-Pltfs. Hulten, et al.)
	Certificate of Service filed
Dec. 1	Reply Brief of Intervenors-Defendants Elmer F. Cravalho, et al. filed
[fol. 670]	
	Answering Brief filed—Attorney General
	Plaintiff's Answering Brief filed
	Answering Brief on Behalf of Intervenors-Defendants Nelson K. Doi, et al., filed

DATE	FILINGS—PROCEEDINGS
1964	
Dec. 2	Addendum to Intervenors-Plaintiff's Answering Brief filed—AG
1965	
Jan. 11	Entering proceedings at trial—Patsy Mink withdrawn as Intervenor-Plaintiff and Thomas S. Ogata withdrawn as Intervenor-Defendant—plaintiff's exhibits 12-18 marked and admitted as evidence—plaintiff's witnesses Robert C. Schmitt, Mr. Frank Takao—defendant's witness: Eileen K. Lota—Defendant's exhibits B&C, H-1 admitted—argument by Masaji Marumoto—case continued to 1/12/65 at 1:30 p.m.
	PRETRIAL ORDER filed
12	Entering proceedings—argument by respective counsel—case continued to 1/13/65 at 9:00 a.m.
13	Entering proceedings at further argument—closing statements by counsel—counsel to singly or collectively submit a suggested form of decree—forms due 1/20/65
18	Reporter's Partial Transcript of Proceedings filed
19	Defendant's Proposed Form of Decree filed
	Defendant's Memorandum Re Proposed Decree filed
20	Proposed Decree filed—plaintiffs
	Proposed Form of Decree of Intervenors-Defendants Elmer F. Cravalho, et al. filed
	Proposed Decree of Intervenors-Defendants Nelson K. Doi et al., filed

DATE 1965	FILINGS—PROCEEDINGS
Jan. 20 (cont'd)	Suggested form of Decree filed—Hulten, et al. and Burns
26	Substitution of Parties filed
Feb. 17	DECISION AND ORDER filed JERTBERG, BEEKS, PENCE
Mar. 1	Appearance of Counsel filed
	Notice of Motion to Alter or Amend Judgment, Motion to Alter or Amend Judgment and Statement of Reasons and Authorities filed
5	Defendant's Memorandum filed—Richardson
	Motion to Amend Motion to Alter or Amend Judgment and Order filed—Intervenors-Defendants
	Memorandum in Support of Motion to Alter or Amend Judgment filed—AG
	Memorandum of Plaintiffs Position on Motion to Alter or Amend Judgment filed
	Appearance of Counsel—Kimura, et al. for Third Legislature filed
	Brief of Intervenors-Defendants Elmer F. Cravalho, et al. and Intervenors-Defendants Nelson K. Doi, et al., filed
9	Entering proceedings—hearing on motion to alter and amend Judgment—Order granting the motion read and filed
	Minute Order on Motion to Alter or Amend Judgment filed

DATE 1965	FILINGS—PROCEEDINGS
Mar. 10	Withdrawal of Counsel filed—Padgett
19	Final Order on Motion to Alter or Amend Judgment filed
[fol. 671]	
Mar. 24	Memorandum of Plaintiffs' Position on Senate Reapportionment Under H.B. 773 and H.B. 987 filed
	Defendant's Memorandum on H.B. 773 and H.B. 987 filed
	Memorandum of Governors Position on Senate Reapportionment Under House Bill No. 773 and Senate Draft 1 filed
	Concurrence in Brief of Attorney General filed
	Brief of Intervenors-Defendants Elmer F. Cravalho, et al., and Intervenors-Defendants Nelson K. Doi, et al., filed
25	Addendum to Governor's Memorandum filed
Apr. 2	Motion to Alter or Amend Order of March 9, 1965 and Order filed
9	DECISION AND ORDER filed in this action on February 17, 1965 (1) declaring those provisions of Article III, Section 2 of the Constitution of the State of Hawaii fixing the number of senators per senatorial district unconstitutional and invalid, the remainder of said Article III constitutional and valid; (2) declaring the proviso at the end of sixth paragraph, Sec. 2, Article XV of said Constitution pertaining to amendments affecting representation in the Senate unconstitutional and invalid, the remainder of said Article XV, constitu-

Apr. 9 (cont'd) tional and valid; (3) denying plaintiffs' claim that the apportionment of the House of Representatives of the Legislature of Hawaii has caused discrimination; (4) enjoining the Third State Legislature in regular session from taking final action upon any legislation, except such actions as are necessary to organize the respective houses at such session and appropriate funds for the session, until legislation, pursuant to the provision of Article XV of said Constitution providing for the submission to the people of Hawaii, by special election to be held not later than August 1, 1965, the question: "Shall there be a convention to propose a revision of or amendments to the Constitution?", and for any and all acts required by law to implement such legislation, has been enacted into law, that legislation shall also provide a special election if the vote be in the affirmative that a special election shall be held not later than September 15, 1965, that the convention convene not later than October 15, 1965 and conclude its deliberation in time to submit its proposed constitutional amendments to the electorate of Hawaii at a special election to be held not later than January 30, 1966, including provisions therein for reapportioning the Senate of Hawaii on a constitutionally valid basis (5) declaring the officers of all senators of the Hawaii Senate vacant as of the day of the general election of 1966, the existing offices of all senators valid until such election date of 1966, (6) retaining jurisdiction of this action by the Court for all purposes, including (a) considering appropriate

DATE
1965 FILINGS—PROCEEDINGS

Apr. 9 (cont'd) sanctions if the orders of court are not carried out (b) judicially reapportioning the Senate in the event the electors of Hawaii reject a constitutional convention, or the Convention fails to propose an amendment reapportioning the Senate, or the electors reject such an amendment, or if any amendment of the convention does not insure the apportionment of the Hawaii State Legislature in accordance with the requirements of the Equal Protection Clause of the 14th Amendment to the Constitution of the United States; (7) denying all other relief prayed for in the Complaint, Com-

[fol. 672]

plaint in Intervention and Cross Complaint, entered this 9th day of April 1965

14 Submission of Proposed Constitutional Amendments Adopted and Legislation Enacted Pursuant to Minute Order Dated March 9, 1965, as Amended filed

15 Entering proceedings—reapportionment—Senate Exhibits S-5 thru S-8 and Government Exhibit GO-4 marked and entered as evidence—Senate Witnesses: Sakae Takahashi and Robert C. Schmitt—case continued to April 16, 1965 at 9:00 a.m.

16 Entering proceedings—argument—case taken under advisement

19 ORDER STAYING INJUNCTION filed

28 DECISION AND ORDER ON HAWAII'S SENATE REAPPORTIONMENT PLAN OF APRIL 14, 1965 filed

DATE 1965	FILINGS—PROCEEDINGS
Apr. 28 (cont'd)	JERTBERG, BEEKS, PENCE
	The Decision and Order on Hawaii's Reapportionment plan of April 14, 1965 filed on this day ordering the stay order of this Court dated April 19, 1965 rescinded, effective forthwith; reinstating automatically and forthwith the Decision and Order of this court dated February 17, 1965, said Decision and Order to continue in full force and effect until the further order of this court; retaining jurisdiction of this action by the court for all purposes; ordering this decision effective forthwith, entered this 28th day of April, 1965.
30	Withdrawal of Counsel filed (Bert T. Kobayashi—AG)
May 3	Motion to Intervene as Plaintiff, Statement of Reasons and Citations of Authorities in Support of Motion to Intervene as Plaintiff and Certificate of Service filed
	Withdrawal of Counsel filed (James T. Funaki)
	Appearance of Counsel filed (Funaki for Okano)
	Notice of Appeal to the Supreme Court of the United States and Proof of Service filed (Governor Burns)
7	Motion to Suspend Injunction and for Stay of Order Pending Appeal, Affidavit of John A. Burns, Application to Fix Time for Hearing, Notice of Motion and Certificate of Service filed
	Withdrawal of Counsel filed (James Funaki for House)

DATE 1965	FILINGS—PROCEEDINGS
May 7 (cont'd)	Notice of Appeal to the Supreme Court of the United States filed (Hawaii State Senators)
	Notice of Appeal to the Supreme Court of the United States and Proof of Service filed (Elmer F. Cravalho, et al.)
10	Concurrence in Motion to Suspend Injunction and for Stay of Order Pending Appeal filed
	Defendant's Joinder in Motion for Stay filed
11	Ruling on Motion to Suspend Injunction and for Stay of Order Pending Appeal filed
	JERTBERG, BEEKS, PENCE
10	Entering Order—hearing on motion to suspend the Injunction continued until moved on by order of the Court
24	Certified copy of order signed on 5/21/65 by Mrs. Justice Douglas filed

[fol. 682] Certificate of Clerk (omitted in printing).

[fol. 686]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

Civil No. 2308

HENRIETTA DAVIDSON HOLT, et al., Plaintiffs,

vs.

WILLIAM S. RICHARDSON, Lieutenant Governor of Hawaii, Defendant;

JOHN J. HULTEN and GEORGE M. OKANO, Members of the Legislature of the State of Hawaii, and JOHN A. BURNS, Governor of Hawaii, Intervenors-Plaintiffs;

NELSON K. DOI, et al. (Senators, Second Legislature, State of Hawaii), Intervenors-Defendants;

ELMER F. CRAVALHO, et al. (Representatives, Second Legislature, State of Hawaii), Intervenors-Defendants.

Excerpts from Transcript of Proceedings—August 25 and 26, 1964

* * * * * * *

[fol. 687] ROBERT SCHMITT, a witness called by the Plaintiffs, being duly sworn, testified as follows:

Direct examination.

By Mr. Tonaki:

Q. Would you state your name and address, please?

A. I am Robert Schmitt. My address is 2319 Ala Wai [fol. 688] Boulevard, Honolulu.

Q. By whom are you employed?

A. The State of Hawaii, Department of Planning and Economic Development.

Q. What is your position with the State of Hawaii?

A. My title is statistician, State statistician.

Q. For how long have you been employed by the State of Hawaii?

A. By the State since April 1958.

Q. Have you been in statistical work all that time?

A. Yes, I have.

Q. Will you briefly state your educational background relative to your job as statistician?

A. I have a Bachelor's and Master's Degree from the University of Cincinnati, and additional graduate work from the University of Hawaii, Michigan and University of Washington, with a good deal of course work in statistical and research methods.

Q. Do you belong to any organization of professional statisticians?

A. Yes, I belong to the American Statistical Association. I am immediate past president of the Hawaii Chapter of the American Statistical Association, and I am a member of the Population Association of America.

Q. Have you written any professional articles?

[fol. 689] A. Approximately 60 articles in professional journals.

Q. Will you state your experience as a statistician previous to your employment by the State of Hawaii?

A. I was Redevelopment Research Analyst in charge of the Research Division of the Honolulu Redevelopment Agency for four years. I worked for several years for the Chamber of Commerce of Honolulu as research statistician. I have also been employed by the local consulting firm of John Childs and Company for several years. And previous to that, I was in charge of research for the Seattle City Planning Commission.

Q. Will you describe your duties as State statistician?

A. I am in charge of the statistical programs of the Department of Planning and Economic Development, and

have been asked by the Governor to coordinate all statistical activities of the State of Hawaii and to develop a statewide statistical reporting system.

I am author and editor of the Statistical Abstracts of Hawaii, which is intended to be periodically revised and updated. And also, I am in charge of reviewing and making recommendations regarding statistical programs of all other State agencies.

Q. What is your relationship as statistician through the United States Bureau of Census?

A. I have the title bestowed by the Bureau of the Census of census tract key person for Honolulu. In each major [fol. 690] metropolitan area of the nation, the Census Bureau designates one person not in Federal service to be their chief contact as liaison and source of information regarding small area statistics in the community. And I have had this position for some years.

Mr. Tonaki: Your Honor, at this time I would like to say to the Court that I have received a stipulation for all Counsel for the introduction of Plaintiff's Exhibit 1 into evidence, a stipulation.

Judge Pence: There being no objection, Plaintiff's Exhibit No. 1 for identification is received in evidence as Plaintiff's Exhibit No. 1. May we have again the title of that exhibit?

Mr. Tonaki: The title is "Tabulation of Registered Voters in Population."

(The document referred to was received in evidence as Plaintiff's Exhibit No. 1.)

By Mr. Tonaki:

Q. Mr. Schmitt, I will now hand you Plaintiff's Exhibit No. 1.

Judge Pence: You will furnish that for us also?

Mr. Tonaki: There are copies there.

Judge Pence: Have we already received that? Is it already in our file?

Mr. Tonaki: I believe so. If not, there are sufficient copies there. It is a one-page exhibit.

[fol. 691] Judge Pence: Is it attached as an exhibit to your complaint? Is this particular exhibit attached?

Mr. Tonaki: No.

Judge Pence: Then we don't have it.

Judge Bowen: I don't have it.

(Documents handed to the Court.)

By Mr. Tonaki:

Q. Mr. Schmitt, are you familiar with this document marked as Exhibit 1?

A. Yes, I am.

Q. Did you prepare this document?

A. Yes, together with the assistance of my staff.

Q. Where did you obtain the figures on population?

A. The 1960 census, the bulletins on the number of inhabitants and the distribution by census tract.

Q. Where did you obtain the figures on registered voters?

A. From the office of the Lieutenant Governor.

Q. To the best of your knowledge, are those figures accurate?

A. Yes, sir, they are.

Q. On the right-hand side of Exhibit 1, there are three columns showing apportionment figures used in the 1960 population, 1960 registered voters and 1962 registered voters based on the method of equal proportions. Did you compute the figures using the method just named?

[fol. 692] A. Yes, I did.

Q. Will you briefly explain what the method of equal proportions is?

A. The method of equal proportions is a technique generally in use to apportion legislative bodies. It has been very extensively analyzed by leading professional bodies

throughout the nation and is recommended as the means for apportioning legislative bodies. The mathematics of the method are fairly complex and would be quite time-consuming to describe in detail. However, I can refer you to an official Senate document of the 1940 U. S. Congress which describes this in considerable detail.

Mr. Tonaki: No further questions, your Honor.

Judge Pence: Mr. Dodge?

Mr. Dodge: I have previously given to other Counsel copies of Defendant's Exhibit A. I have copies available for the Court, copies for each.

Judge Pence: You are now offering Defendant's Exhibit A into evidence?

Mr. Dodge: Yes, I do.

Judge Pence: Is there any objection, as far as you know?

Mr. Dodge: There is no objection.

Judge Pence: No objection? Defendant's Exhibit A for identification is received in evidence as Defendant's Ex-
[fol. 693] hibit A.

(The document referred to was received in evidence as Defendant's Exhibit A.)

Judge Pence: And will you state the title of that exhibit for our edification?

Mr. Dodge: It is the written testimony of Mr. Schmitt given before the State Senate on July 24, 1964.

Judge Pence: The testimony of this same witness?

Mr. Dodge: Same witness.

Judge Jertberg: May I inquire, is this part of cross-examination of this witness or is this on behalf of your own case?

Mr. Dodge: Well, all I wanted to do is establish if he did this, and I haven't any questions on cross-examination, any further questions.

Cross examination.

By Mr. Dodge:

Q. Showing you Defendant's Exhibit A, did you prepare that, Mr. Schmitt?

A. Yes, I did.

Q. And the same sources that you spoke of as far as Plaintiff's Exhibit 1 were used in your compilation of those figures?

A. Together with certain additional material from the Bureau of the Census and other sources necessary to com- [fol. 694] plete the narrative of this.

Mr. Dodge: I have no further cross-examination at this time.

Judge Pence: Inasmuch as your position, Mr. Kobayashi, is, I think, similar to that of Mr. Tonaki, do you have any questions that you wish to ask at this time, or should I address you, Mr. Kanbara?

Mr. Kanbara: We have no questions.

Judge Pence: Mr. Padgett?

Mr. Padgett: I have a question.

Cross examination.

By Mr. Padgett:

Q. Mr. Schmitt, what do you mean by your statement that the method of equal proportions is recommended by a means of apportioning legislative bodies?

Judge Jertberg: Where does that statement appear on the exhibit?

Mr. Padgett: Your Honor, that was in his direct testimony that he made that statement.

A. The method of equal proportions was first described in 1920, I believe, by Mr. Huntington, who was a Professor of Mathematics in Harvard. It was subsequently considered by several professional bodies, including an of-

ficial advisory group to the Bureau of the Census. And if I may refer to my notes on this, it was recommended by [fol. 695] the advisory committee to the Director of the Census in 1921, and in the National Academy of Sciences in 1929.

Q. What were the terms of the recommendation?

A. They had reviewed the method and also several alternate methods and found that this was the best technique for apportionment for allocating fractional representation, so that certain anomalous situations brought about by the use of alternate techniques would not occur. For example, under certain of the previously-used methods, there had been the possibility that an area gaining in population might actually lose in its number of seats in a constant size body when all other areas remained constant. There were several other peculiar developments that might occur, using these alternate techniques. Now, just as a hypothetical example, if there were ten seats to be apportioned and there are three districts, one with thirty-three per cent of the population and another with thirty-three and a third or thirty-four, each would get three seats leaving one to be given to one of the three on some arbitrary method. The method of equal proportions would allocate that by the most suitable way so that the theory being that no other procedure would as well reduce the number of voters or population, whatever the basis per representative to his equal amount.

Q. So the recommendation is a recommendation based on its statistical validity?

[fol. 696] A. That's right.

Q. When you are dealing with numbers?

A. It was purely a mathematical technique of doing this most efficiently and meaningfully.

Q. There was no judgment based in that recommendation on the geographic, historical, economic, or other consideration that might enter into an apportionment?

A. None at all. This was done entirely with regard to the apportionment of the United States Congress.

Mr. Padgett: Thank you. I have no further questions.
Judge Pence: Mr. Funaki?
Mr. Funaki: I have no questions.

EXAMINATION BY THE COURT

Judge Jertberg: Mr. Schmitt, I notice Article III, Section 4 of the Constitution of the State of Hawaii contains in several places the phrase, by the method known as the "method of equal proportions."
The Witness: That's right.
Judge Jertberg: Now, what information do you have as to the insertion of that phrase in the Constitution? Were you active in the preparation of this Constitution?
The Witness: No, sir, I was not. I assumed that it would be discussed in the proceedings of the Constitutional Convention.
Judge Jertberg: And is it your view that the method [fol. 697] mentioned in the Constitution is the same method of equal proportions which you discussed?
The Witness: There is only one method known. This was discussed not only in reference that I cited, the Senate document, but it was also described in the Brookings Institution Report at considerable length and in a number of reports subsequently issued. And I have never seen any other technique given to this title or this technique given any other title.
Judge Jertberg: Is the document, the Senate document, available? Do you have it?
The Witness: I do not have it. However, the Legislative Reference Bureau does have a copy and I understand it is their copy that I reviewed in preparing for this case.
Judge Jertberg: And, as I understand, that document goes into detail in explaining the operation of the method of equal proportions?
The Witness: That's right.
Judge Jertberg: Do any Counsel have the document available?

Mr. Dodge: We can get it, your Honor.

Judge Pence: This being the Plaintiff's case, we will ask that the Plaintiff supply the Court with a copy for reference. We may not be able to have a copy for our own personal use but it should be available. Mr. Tonaki, you [fol. 698] will supply it?

Mr. Tonaki: May I ask what document the Court is referring to?

Judge Pence: Do you have it there?

The Witness: I have a verifax copy of the part that is pertinent to what we are discussing, and also Brookings Institution 1941 Report, Congressional by Schmeckbier.

Judge Pence: Mr. Tonaki, will you secure copies for the record as well as for each individual Judge, copies of these two reports which the witness just mentioned and shown us the reproductions?

Mr. Tonaki: Your Honor, my associate, Judge Marumoto just informed me that he has heard about a document by our Legislative Bureau, probably in 1958, Number 2 which touches on this subject also. If the Court would like to have us dig that up, if possible, we can do that.

Judge Pence: You will offer them at a later date as exhibits for the Plaintiff?

Mr. Tonaki: Yes, your Honor.

Judge Pence: Next in order. Mr. Padgett, you were on your feet for a moment.

Mr. Padgett: I was about to say that when these documents are made available, perhaps various Counsel would have further questions of Mr. Schmitt.

Judge Pence: Your right is reserved for further ques- [fol. 699] tions based upon the documents. Mr. Schmitt, referring to Exhibit No. 1, you have only broken it down in your exhibit here, your figures, into two categories. I take it that your 1960 population is your gross population?

The Witness: That's right.

Judge Pence: For the information of the Court, will you state what goes into the making up of the gross population? In other words, children, aliens, what military personnel, if any, and so forth.

The Witness: Yes, sir. The 1960 Census definition of population used in its compilation, the 1960 Census data, included all persons whose normal place of residence was in the State of Hawaii. Now, in the case of certain rather unusual groups, less commonly found groups, a certain modification to this definition was necessary. In the case of the armed forces, for example, it included all armed forces stationed ashore in Hawaii, regardless of their legal or voting residence. It included all men aboard ships in Hawaii ports on the census date, which was April 1st, 1960; that is, a ship tied up in Kapalama Basin or in Pearl Harbor, Ford Island, the entire crew of that ship was assigned to that geographic area.

This was also true in the case of civilian ships. For example, the Ala Wai Yacht Harbor included a number of house boats and yachts which were enumerated in Hawaii.

[fol. 700] Judge Pence: Presupposing on that day the Matsonia had been in port,—this is just hypothetical—would all of the crew of the Matsonia have been included?

The Witness: Yes, the crew would have been, but not necessarily the persons, the passengers aboard the Matsonia.

Judge Pence: Presupposing the Royal Hawaiian or the Reef or the Halekulani, the Princess Kaiulani or any of the rest have been full of persons residing one day, one week, one month on that particular day, what, if anything, is reflected in this gross figure of the 1960 population, referring to those individuals?

The Witness: If the person on the night preceding the census had been there, on the so-called H-night, each hotel or transient accommodation was enumerated; every person in these accommodations was listed and given census schedule, asked questions of all persons in the census.

Judge Bowen: In other words, on the day the census was taken, on the day the population was counted, every human being on the face of the earth within the territorial limits was counted, is that right?

The Witness: No, they enumerated every person in Hawaii at that time, but they then reallocated them to

their home states, any persons caught on this H-night survey who said their place of usual residence was elsewhere—for example, a tourist staying at one of the Wai- [fol. 701] kiki hotels would have been asked, is this your usual place of residence? And if he answered, "No, I am from California," they would then ask the questions of him but send his census response back to California to the District Supervisor's office of the Bureau of the Census to be entered in California. If a member of his family who had not come on vacation and had answered for him in California,—and this happened most of the time—they would then match the two replies and the cards as one of them.

Judge Bowen: Was it some sort of a formula that was applied by which the possibility of such person being included in the number enumerated was deducted?

The Witness: Well, supposedly he would have been caught in either place, as he should have been caught in Hawaii—

Judge Bowen: Do you have some sort of a formula?

The Witness: There was no formula. We don't know how many were here at that time. But we made an estimate based on the Hawaii Visitors Bureau statistics which would indicate that no more than 10,000 were here on April 1st, 1960. Those would have been reallocated to the mainland, or if they were foreigners, say, visiting from Japan, they would have been disregarded in the census. The Census Bureau did not report how many such persons were reallocated. We had to rely on the Hawaii Visitors Bureau statistics. As you know, each person entering the State is given a form by the Department of Agriculture, [fol. 702] and the Hawaii Visitors Bureau uses this information to obtain such things as whether the man is a resident of Hawaii or an intended visitor; if he is a visitor, what State he comes from, and so forth.

Judge Bowen: In this information you give us, is it true or not true that there is no certainty about how many of those people were reallocated?

The Witness: There is no certainty how many were reallocated. We assume that all of them were.

Judge Bowen: My question is, there is no way by which you can let us tell how many there were of them so as to give or not give any account or to give their numbers, to count their numbers as being significant or insignificant?

The Witness: If I may refer to my notes—

Judge Bowen: Yes.

The Witness: —based on the best available information I have, the number of visitors present at the time of the 1960 U. S. Census who were caught here in the census but reallocated to the mainland before publication of the census results, was 7,912. There were 3,710 approximately Hawaii residents who were out of the State at the same time, who were caught on the mainland and reallocated back to Hawaii. I must underscore that this is an estimate based on other information.

Judge Pence: Would you say, then, that that is a reasonably accurate figure, is reasonably accurate, the method [fol. 703] used by the census, as reasonable as they could make it? Or would you say it is substantially accurate?

The Witness: I would say it is substantially accurate. This is not based on census information.

Judge Pence: It is based on what?

The Witness: On information provided by the Hawaii Visitors Bureau. You see, it is an editing procedure.

Judge Pence: You use the term "editing"? Who did the editing, the census or yourself?

The Witness: This was done by the whole census officials who, when they encountered such information, in return said that person was actually a resident of the mainland and sent the form back to the district from which he came.

Judge Jertberg: Mr. Schmitt, the figures on Exhibit 1 on registered voters relating to 1960 and 1962, those are accurate figures?

The Witness: Those were obtained from the office of the Lieutenant Governor, and I assume those are accurate,

barring some inadvertent typographical error which I certainly hope has not occurred here. This has been retyped several times.

Judge Jertberg: Is there any way by which one can determine from available statistics, the number included in the gross population who are qualified to register but failed to register?

[fol. 704] The Witness: I have made such an estimate based on the census and other information.

Judge Jertberg: For what years?

The Witness: For 1960 and then for 1964.

Judge Jertberg: Those figures that you just mentioned do not appear on Plaintiff's Exhibit No. 1?

The Witness: No, sir. These appeared in my testimony before the State Senate on July 24th. I believe a copy of that has been entered as evidence.

Judge Jertberg: That would be Defendant's Exhibit A, is that right, this document that I am handing you?

The Witness: Yes, sir.

Judge Jertberg: On what page do they appear?

The Witness: The 1960 estimate appears on page 6.

Judge Jertberg: That is Table 1, Voting Eligibility and Participation of the Population, 20 Years Old or More, 1960?

The Witness: That's right.

Judge Jertberg: And upon what sources was that table appearing on page 6 of Defendant's Exhibit A obtained?

The Witness: The population, 20 years and over, was based on the 1960 Census count. The number registered was based on the Lieutenant Governor's information for November of that year. Now, here we are comparing April, 1960, eligibility in November of 1960 registration. There was no [fol. 705] way to adjust that. The not-registered was a residual figure between the registered and the eligible to register. And the eligible to register in turn was the residual figure between the population of twenty and over and not eligible to register. The eligible to register I ob-

tained from a number of sources, from those not United States citizens, based on the annual alien address reports of the United States Department of Justice.

The residents under one year was based on samples, on sample studies undertaken by the Hawaii Newspaper Agency, Incorporated.

As a sample, 2,500 on Oahu households and 900 Big Island households which gave the turnover in population and the residents of one year earlier population living in households.

The population in institutions was based on information obtained from the Department, what was then the Department of Institutions, since a part of the Department of Health and the Department of Social Agencies.

The military personnel was based on reports from the local commanding officer, who, as of April 1, 1960, gave us both the number of members in the Armed Forces in each branch of the service, their island, the island where he was stationed, and the age and sex distribution. This was given both to the Armed Forces and to the dependents separately. [fol. 706] So that from these sources, I was able to arrive at an estimate of the number of persons not eligible to register. And by subtracting that from the number of twenty and over, obtained the number eligible to register.

Judge Bowen: Which number was what?

The Witness: Well, the number of eligible to register was 231,914.

Judge Bowen: That was the number not eligible?

The Witness: No, the number not eligible was 128,279, not eligible to register. The number eligible was 231,914.

Judge Pence: If I understand you correctly, the registration figures, that is, not eligible to register because of residence under one year, that that figure is, you feel in your opinion, substantially accurate?

The Witness: That is probably the weakest of all the statistics in here, because at a later date, using information such that became available, I made an estimate of January

1, 1964, and there was a greater change in that than would be indicated by the change in population or any other factors. It was actually a profit in technology, and my 1964 estimate was 12,008 as against 8,529 in 1960. If I were doing this 1960 table over again, I would adjust that residence under one year upwards somewhat to perhaps 11,000 as a guess. But the statistics on which I made my 1964 estimate were not available at the time in 1960.

[fol. 707] Judge Bowen: Do I correctly understand you to say that of the 1960 enumeration the total military estimated to have been eligible for enumeration were 231,000?

The Witness: No, that was the total number of persons in the State eligible to register. Now, that excluded all members of the Armed Forces and all dependents. As you will see on page 7, which presents the January 1, 1964, estimate, I had a subnote saying that all military personnel and dependents are assumed to be registered in other states or otherwise ineligible. In October, 1962, military personnel and dependents who were twenty years of age or more, had one year or more residence in Hawaii and were living off Base, numbered 11,400, including 5,900 servicemen and 5,900 dependents. Now, because some of the Armed Forces stationed here are local residents, to exclude all of them was a rather arbitrary procedure. At the time I had no information on that. However, since then, certain information on eligibility of the Armed Forces has become available. For example, a sample survey made by the Honolulu Star-Bulletin in October, 1962, and published by the Honolulu Redevelopment Agency in July, 1963, indicated that 23,900 households headed by a member of the Armed Forces lived on Oahu. Now, most of the Armed Forces in the State, practically 99 per cent, are on Oahu.

Judge Pence: Ninety per cent?

The Witness: Ninety-nine per cent. An estimated 8.3 [fol. 708] per cent of these household heads were Hawaii-born, that is, of the household heads who are members of the Armed Forces on Oahu, 8.3 per cent were Hawaii-born.

71.5 per cent had lived in Hawaii at least one year and 11.4 per cent had lived here at least five years, and 6.7 per cent occupy their own homes.

Judge Pence: On what page is that?

The Witness: This appears, by the way, in the first paragraph of page 4 of my testimony before the State Senate.

Judge Pence: Of this Exhibit A? You said that if you were to take the 1960 population figures as set forth on Table 1 of Exhibit A and were to use new methods, new sources, I think, utilizing new sources made available after this compilation was made regarding the residence under one year, that you would increase this figure to some round figure of 11,000 persons?

The Witness: Yes, sir.

Judge Pence: And that, then, would result in, let's say, a swing of 2,500 persons?

The Witness: Approximately, yes.

Judge Pence: And where would that come from, your figures there in Table 1?

The Witness: This would result in an increase, of course, in the sub-total label not eligible to register and would then result in a decrease in the sub-total eligible to register, and the decrease would be in the not-registered component [fol. 709] which would drop from 29,855 to about 27,300 approximately.

Judge Pence: So the eligible to register, then, would decrease?

The Witness: That's right.

Judge Pence: By approximately 2,500?

The Witness: That's right.

Judge Pence: Now, in determining the not-eligible to register, you have taken simply the figures of those twenty years of age and over and eliminated aliens, those residents who are not qualified under the one-year residence clause?

The Witness: That's right.

Judge Pence: And when you go into the matter of institutions, every person in an institution is an alien?

The Witness: No.

Judge Pence: A citizen?

The Witness: Let me clarify that. When I say institutions here, strictly speaking this is a population twenty and over in two types of institutions—three types actually—State Hospital or mental patients, Waimanu Home for the feeble-minded and Oahu Prison and the prisons on the other islands, and the one in Hilo, and also the Honolulu Jail prisoners at that time. And only of those twenty and over are estimated to be citizens. This involved an element of estimate. It was necessary to make these estimates to avoid [fol. 710] double counting. Now, the words of the State Constitution, I realize, do not put it in quite these terms. They say a person convicted of a felony and not pardoned and a person who is non compos mentis, the best approximation of that I could get for practical purposes was the number of patients at that time in the homes for the feeble-minded and State Hospital and in jail and in prison.

Judge Pence: And would you have an opinion as to what you would feel would be the maximum margin of error in your estimate, error or what could be by tremendous effort possibly develop. What would be your own estimate of the margin of error there?

The Witness: Well, beginning with those least likely to produce error, I would say that the information on Armed Forces and dependents would be extremely close and there would not be an error of more than a fraction of a per cent there. The number in institutions is a relatively small number so that the percentage, the number of persons involved would be quite small.

Judge Pence: So in the over-all picture it would also be, then, your opinion that it would be only a very small fraction, a small fraction of one per cent?

The Witness: I would say that the chief one—

Judge Pence: I am talking about institutions.

The Witness: Yes, relative to the number of persons [fol. 711] involved, it would be quite small. Residents under one year, as I mentioned, was the weakest in this 1960 esti-

mate. Using the most recent information available, as I told you, it increased the number rather sizeably relative to the number originally estimated. However, the number of persons in absolute terms involved is not too great.

Judge Pence: That figure you estimate would be 2,500 plus or minus?

The Witness: That's right. I would say that would be 2,500. And the probable amount of error in the 1960 estimate thus corrected would not exceed 1,000 persons. The number of aliens appears to be a very carefully compiled figure from the United States Department of Justice, Immigration and Naturalization Service. I suppose there are a certain number of wet-backs, so to speak, in Hawaii who are here illegally, since they didn't admit their alien status as aliens to the Bureau.

There are surprising statistics on this. For example, there are 4,500 persons from the Trust Territory of the Pacific in Hawaii. This seems like a sizeable number to the 85,000 who are still living there. I suggest a tremendous out-migration of the Trust Territory out here. Or perhaps some other people from the Pacific who would be considered in a different status and indicate their residence as Trust Territory. That I don't know.

[fol. 712] Judge Bowen: Do you want to state as to the future possibility as to migrants, future migrants to Hawaii?

The Witness: Well, we made only estimates for the 1960 Census and the 1964 date. The projections would be quite difficult to obtain.

Judge Pence: Insofar as the figure on the Trust Territory—

The Witness: This information from the census report is on place of birth. And I notice that a somewhat smaller figure appears in the information which I use as a source for this, not United States citizens, and it is the Department of Justice data. The difference is either a more accurate count or perhaps some of those Trust Territory people have

obtained citizenship. The 4,500 that I quoted was a census count on the place of birth. On the accuracy of the remaining statistics, the registration data are presumably quite accurate, although even the official statistics on elections are, as you know, subject to error, as witness the recount of the 1960 presidential election in Hawaii which put Hawaii into the Democratic column rather than the Republican as first thought. I believe Mr. Dodge is acquainted with that.

The final figure was the twenty years and over count on the census. And this, of course, brings up the question of the reliability of a census count. There have been some estimates made and published in the most recent issue of the [fol. 713] Journal of the American Statistical Association of this matter. The estimates published by the American Statistical Association bear only on the native white population. However, because of our unique situation in Hawaii, it is likely that the foreign-born and nonwhite population is more accurately enumerated here than the native Hawaiian, which, of course, is the opposite of the situation on the mainland where the foreign-born and nonwhite tend to be more mobile, to be located in areas more inaccessible or threatening to confuse the enumerators and, as a result, more likely to be enumerated—and if you would like, I can give you the data from this article on the Statistical Journal—

Judge Pence: It is not specifically applicable to our local problem, is it, in connection with the figures used on page 6 of Exhibit A, one year and over figure?

The Witness: It would probably give a maximum amount of error to be expected in the census count.

Judge Pence: In your opinion, what would be the maximum amount of error, then, in that figure of twenty years and over based on this report which you refer to?

The Witness: Based on national statistics, it would probably run—it is given nationally separately, male from female—2.2 per cent net census under-count for male, and 0.8 per cent net census under-count for female. So the aver-

age of that would be one and a half per cent which would [fol. 714] be, I would say, a maximum amount of error likely to be encountered. That is, if Hawaii followed the national pattern, this figure would be probably one and a half per cent under the actual number of persons resident in the State at that time.

Judge Pence: Is this method which you have used in arriving at what you testify substantially correct analysis of the voting eligibility and participation of the population twenty years or more, and in order to prepare this, does it take an abnormal gross and tremendous amount of time and effort to make it very difficult to do, say, every ten years?

The Witness: This probably took me about, oh, I would say 40 hours of my spare time to prepare when I did it for the University for the Social Research Laboratory several years ago.

Judge Pence: Do Counsel have any questions? Mr. Tonaki?

Mr. Tonaki: No questions.

Judge Pence: Mr. Dodge?

Mr. Dodge: I have some questions based on the Court's questions.

By Mr. Dodge:

Q. Mr. Schmitt, all of these figures based on the 1960 Census, this is your starting point?

A. That's right.

Q. Are those figures available within the geographic [fol. 715] boundaries of the election district or precinct?

A. You mean with reference to those who are eligible or not eligible, the total population—

Q. The total population figures.

A. Total population, yes. We have total population for the State, each county, each one, not strictly speaking each representative district because the district lines sometimes cross statistical matters. However, the State is divided, in the case of Oahu, there are 113 census tracts. The census

tract is a smaller published unit for large areas for statistical information for the census. And there are 37 county divisions. In addition, block statistics are published as part of the census of housing and simultaneously with the census of the population, for Honolulu City, Hilo City, Wailuku, and Lahaina.

Q. Isn't it true, though, Mr. Schmitt, that it is rather rare when the census tract coincides with the precinct in an election district?

A. Very true. There seems to have been an unfortunate disregard of precinct boundaries and representative district boundaries in laying out the census tracts, and vice versa.

Q. May I ask you this: You have been referring to an alien population, a sizeable number. Is that figure available to you in any but a state total?

A. For 1960 or 1964, no. The most recent date of which [fol. 716] this information was compiled on the smaller area basis was 1958, at which time the Department of Justice compiled the Alien Address Report by county. Now, that was the basis for allocation in the table that I have been discussing there.

Q. But you don't know where these aliens live with respect to election districts?

A. By district, no; only on a broad idea with respect to counties.

Q. Would that same thing also be true of military personnel?

A. No, we know—

Q. Military personnel living off Base?

A. Well, let me state exactly here—the 1960 Census gave us the number, the total population of each census tract and then gave us the number of persons in the Armed Forces in each tract. So that regardless of whether they were living on base or living off base, for example, you can tell how many Armed Forces were living in Waikiki or Makiki or Waialae-Kahala on the census date. You know

they were not living on the base. They also gave us the total number of persons living in each military installation. Now, those are not broken down by military status. In other words, the number of persons enumerated in Schofield Barracks included those civilians, those civilian dependents of the Armed Forces, and the Armed Forces themselves, and perhaps some civilian employees of the Armed Forces. [fol. 717] Q. Is there any reasonable practical method of determining the number of military personnel and their dependents who are eligible to vote in Hawaii by representative district or by election district or by precinct?

A. The number of military dependents who are eligible to vote by representative district, this would strain the available statistical sources to the breaking point, I'm afraid.

Q. Now, as these problems are faced, you go to the Lieutenant Governor's Office and get the number of registered voters for each representative district, and do you have to make any estimate to do that?

A. By existing representative district, we have the exact number of representative voters by the 1960 elections, the 1962 elections, and so on.

Q. One more question. The method of equal proportions can be used with respect to any base?

A. That is true, we could use it.

Q. The number of names in the 14th District as compared to the number in the 12th and people registered?

A. Yes. It is simply a mathematical technique to minimize the discrepancies when you have six geographic areas and a base for each of those areas.

Mr. Dodge: No further questions.

[fol. 718] Judge Pence: Mr. Padgett, before you continue, inasmuch as it appears that there are certain avenues which have been opened up, we will take a ten-minute recess. (A recess was taken.)

AFTER RECESS

Judge Pence: Mr. Padgett.

By Mr. Padgett:

Q. Mr. Schmitt, on page 4 of Defendant's Exhibit A appears the following paragraph, that is, the third paragraph:

"Many components of the eligible or ineligible population must be estimated from inadequate data. For example, it is possible to obtain civilian non-institutional population 20 and over from the 1960 Census, but data on military dependents registered in other areas, aliens 20 and over, absentee voters, and persons with less than one year residence are not readily available. Such a set of estimates is necessarily inexact, even at the State level; for counties or smaller areas, or for postcensal dates, even greater imprecision is inevitable."

Is that still your opinion?

A. It is.

Q. Now, with reference to your census figures, you say the census tract boundaries do not in any sense coincide with the district boundaries, voting district boundaries, for [fol. 719] the purpose of electing representatives as presently constituted?

A. In most cases, I would say at least three quarters of the boundaries do not coincide.

Q. Going down below this census tract, what is the next unit that the census has, smaller unit?

A. Below the census tract, they do publish block statistics, as I said, for Honolulu City and for Hilo and Lahaina and Wailuku. However, for areas other than these, the smallest unit is the enumeration district, an area averaging 800 in population, which is used as an administrative unit. Statistics are not normally published for these districts and it is used for covering the single—the Bureau will provide statistics for enumeration districts at cost.

Q. These are not presently available in the State?

A. We do have a total population count in enumeration districts in an unpublished form. That is, we have a typewritten page which is reproduced by the ozalid process, I believe, in a limited number of copies by the Department of Transportation, and the Department of Transportation is presently engaged in mapping the enumeration districts and putting on the map within each district the population from that unpublished form, which we obtained from the Census Bureau.

Q. How soon do you think that particular endeavor will be finished? How soon will they have a map which will set up the enumeration districts?

[fol. 720] A. It was found that certain maps which were supposedly in the State were missing. However, those were obtained and I understand within the week the work will be completed.

Judge Pence: Excuse me, Mr. Padgett. (To the witness) You mean within seven days or within the next two or three days?

The Witness: I would say that by Friday of this week, Friday afternoon, the work should be completed. I understand that it is simply a matter of putting some corrections and additions on the maps that they have completed, with the exception of these corrections already.

Judge Pence: One moment, Mr. Padgett. In line with this map, except for these last-minute amendations and corrections, and so forth, would it be possible for you to secure a sample map and show the Court exactly what is being done on those maps?

The Witness: I should be happy to do so.

Judge Pence: Even though they are not finished?

The Witness: Yes.

Judge Pence: Proceed.

By Mr. Padgett:

Q. That map would be available in undertaking to draw district lines, to try to balance population?

A. That's right.

Q. Has there been prepared by you or your department [fol. 721] or anyone, to your knowledge, a schematic redistricting, redistricting of the State, looking toward the balancing of population for purposes of apportionment?

A. When this matter first came up, the Governor asked my department to lay out a working set of maps which would show twenty-five proposed senatorial districts and fifty-one proposed representative districts in which substantially similar populations in each would be the major criterion, and the basis would be the total population, 1960 Census, using census tracts and census county division boundaries. Such a set of maps was prepared for working purposes, and then set aside because it was decided that because of mechanical difficulties in the registration of voters, it would be better to go along on the existing precincts. However, on the request of the Senate and approval of the Governor, I did provide the State Senate with a copy of each of the maps so prepared.

Q. What was the mechanical difficulty with regard to precincts?

A. In a discussion with the Lieutenant Governor and Emperor Hanapi of the City and County, the City Clerk, we learned that registration of the entire electorate of Oahu in short order by new district lines would be rather difficult for the City Clerk's Office. And he asked, and Mr. Richardson directed him, that the boundaries follow exist- [fol. 722] ing precinct boundaries to minimize the mechanical difficulties of reregistration.

Q. And you had not as yet prepared any schematic, any scheme which on a map does follow existing precinct lines?

A. No. Here the problem was that we had to estimate population by existing precincts. Now, a member of the Lieutenant Governor's staff is working under our supervi-

sion on this job. It cannot be completed until the Department of Highways, the Division of Highways, Department of Transportation, completes its mapping of the enumeration districts.

Judge Jertberg: Do I understand, if you create new district lines, one of the difficulties would be to have the voters who, because of the new district line, would have to reregister to be able to vote in the new district? Is that one of the problems?

The Witness: Mr. Hanapi said it would either have to be a reregistration or the development of a new street index by which all registered voters as of today can be reallocated to the new precinct and district.

By Mr. Padgett:

Q. Now, we have been discussing the mechanical problems of redistricting. In addition to the mechanical problems of reregistration of voters and matters of that nature, are there not also involved in this problem other factors such as political complexion of the people in a certain district, economic levels and matters of that nature which [fol. 723] are normally taken into consideration?

A. In our set of maps based on census tract boundaries, and using 1960 total population, we disregarded homogeneity of districts, feeling that first of all in the Legislative Reference Bureau's analysis of the Supreme Court decisions, homogeneity had been given, I would say, a tertiary importance. The stress had been on substantial quality of population first; second, on contiguity and compactness of the areas. And only after some minor points, social, ethnic, political homogeneity. And, of course, as a practical matter, the very first of those criteria was so difficult to achieve, using the rather unwieldy building blocks we had to work with, that we were happy to achieve this substantial equality of population regardless of any violations of ethnic identity or economic homogeneity. For example, we wound up putting Portlock Road in with Waimanalo Val-

ley, which would be a rather interesting combination, I believe.

Judge Pence: For the benefit of the record, will you state the ethnic and economic homogeneity of Portlock Road as compared to Waimanalo Valley?

The Witness: Well, Portlock Road is a high-income area.

Judge Pence: Mr. Henry Kaiser, I think, lives out there, doesn't he?

The Witness: He does. He lives at the end of Portlock [fol. 724] Road. It is primarily Caucasian. I would assume its politics to be rather Republican, largely managerial.

Judge Jertberg: It is a pretty violent assumption with Mr. Kaiser there.

The Witness: It is largely Republican, I would say. On the other hand, Waimanalo Valley contains a Hawaiian Homes Commission area occupied by people of pure or part-Hawaiian blood. It has a consistently Democratic voting record. The incomes tend to be rather low. And the occupational structure is quite different than that of Portlock Road.

By Mr. Padgett:

Q. Well, considerations of such combinations are of a political nature and not part of the domain of your statistical office, I take it?

A. We could make no effort to try to combine or separate such areas. It was too difficult a task. So we ignored that criteria.

Judge Pence: Would all parties stipulate that there does not exist in the district presently created any gerrymandering of districts on the basis of political or ethnic grounds, or economic grounds? (Counsel confer.)

Mr. Padgett: Your Honor, in view of the fact of certain voting trends, I don't believe we can stipulate that there is not in fact the situation as of the present time.

Judge Pence: Well, you enlarge upon that. What do [fol. 725] you mean?

Mr. Padgett: What I am getting at is, regardless for what purpose the various districts were created, nevertheless it is true that there are districts which, for example, have all Democratic legislators, and there are districts which have all Republican legislators.

Judge Pence: Would you say, using the term "gerrymandering," meaning that there was deliberate action on the part of some economic ruling group or some ruling, controlling ethnic group, or some controlling political group, which made those lines and those particular places for the purpose of making sure that one certain district was controlled by one certain fact—

Mr. Padgett: Not having been a member of the Constitutional Convention, your Honor, I really don't know.

Judge Pence: We will leave that with you gentlemen to see if a stipulation concerning that can be made.

By Mr. Padgett:

Q. Now, Mr. Schmitt, in the 1960 Census, one heard rumors that they picked up the personnel of an aircraft carrier lying off Waikiki. Do you know anything about that?

A. It was not an aircraft carrier. There were two ships, one the Kiwishiwi, I believe it is pronounced, and the other the Black Hawk, or some such thing, I am not sure. I would have to refer to the original correspondence, where [fol. 726] the total personnel of perhaps four hundred who were assigned to an Enumeration District 91 which is located in Census Tract 19. I found that enumeration district and found that it was a district which included a strip of beach—well, the entire area makai of John Ena Road—I'm sorry—Kalia Road—to its intersection with Ala Moana, and makai of Ala Moana from the intersection of Kalia Road to Ala Wai Yacht Harbor. But excluding the Yacht Harbor itself. The Yacht Harbor was the location of a num-

ber of house boats and yachts which were listed as such. But here we had approximately four hundred of the ship's crews, military, classified as military, who were assigned to this enumeration district which presumably was on land. Now, when I checked further, I found that they were at Pier Hotel-7. They call it Hotel-7. And another pier, K-1, I believe. I'm not sure. It is immaterial. These are as nearly as I could tell at Ford Island. And it was simply a misallocation, a clerical misallocation of approximately four hundred persons at the time of the Census. I had some correspondence with the Bureau of the Census about this and they took a sort of a horrified view of it, saying, "That is four years ago; don't bother us with that."

This isn't nearly as bad as what happened in 1920 when they inadvertently threw 3,000 Pearl Harbor people into Pearl Harbor, which is part of the Ewa judicial district, into the Honolulu judicial district. And in 1950 I obtained [fol. 727] copies of the enumeration district data and found this error had occurred. So they had retrospectively in their recaps and current census report made that correction.

Judge Pence: One moment, Mr. Padgett, because I want to see that the Court understands this, too. In the total or gross census 1960 population, on Plaintiff's Exhibit 1, the figure of those 400 on those two ships would be included in the population of the State of Hawaii?

The Witness: It would be included under the 15th District, that is, 15th House District and 4th Senatorial District. That table was compiled before we were convinced that there had in fact been an error.

Judge Pence: 15th and 4th?

The Witness: That's right. I could give you at a later time the exact number of persons involved in this. They would have been assigned to the 10th Representative and 5th Senatorial Districts if this error had not been made.

Judge Bowen: Mr. Padgett, may you suffer one more interruption? If you know, what is the numerical difference

between the number of registered voters and the number of the population of Hawaii in 1960, was the numerical difference determinable from your statistical studies?

The Witness: The difference between the number of registered voters and the total population?

Judge Bowen: Well, the number of the population which [fol. 728] may be probably determinable from your study, your statistical study and the guide-lines which you applied and the conclusions you testified to today about the gross population and what persons you took into account.

The Witness: Well, the total population of the State was 632,772. This figure up here is in my testimony before the Senate on Table 3, on page 8. The population of twenty and over, of course, is only 360,193. We have a very young population. Perhaps 45 per cent of our population is under the eligible age to vote.

Judge Bowen: The difference is what? I want to know what you think the difference is. What is the number?

The Witness: Well, the number of persons who were on neither eligible to register or registered was the difference between 632,202, which is roughly 430,000 persons who did not vote, who were either too young or otherwise ineligible or simply did not bother to register.

Judge Bowen: Does that represent the number of people which constitute the difference between the number of registered voters and the number of gross population as you determined it?

The Witness: That's right, about 430,000.

Judge Bowen: How much of that difference may be accounted for by the presence of non-permanent residents?

The Witness: Now, permanency is a rather—

[fol. 729] Judge Bowen: A substantial length of time.

The Witness: —as I mentioned earlier, a rather surprising proportion of the Armed Forces are either Hawaii-born or have lived in Hawaii for at least one year. Now, this degree of permanence would be, I suppose, a matter of definition. The population under one year, my adjusted fig-

ure would be around 11,000. This is only the population—of course, civilian and age 20 and over, and non-aliens. We, in addition, have some rather odd groups such as students who are classified by their actual place of residence—I mean where they are actually sleeping. For example, a California student, California native, who is attending the University of Hawaii and is living in one of the student dorms or a rooming house here, would be enumerated in that rooming house or dormitory. A Hawaiian native living and attending school, say, at Berkeley and living in a dormitory at Berkeley is enumerated there.

Judge Bowen: I do not wish to indulge in further discussion of the details of your study, but I wish you would just summarize by giving in answer to my question what specifically is the numerical difference between the number of registered voters, which I understand is the basis, instead of population,—what I want to know is, what is the numerical difference between them, namely, the registered voters, and this number of people, the population which it is claimed by some should be the basis—

[fol. 730] The Witness: Well, the total population, as I said, is almost 633,000. The number of registered voters is 202,000. It is somewhat less than one-third of the total population. And the number not eligible, or if eligible not registered, is 430,000, and is somewhat greater than two-thirds of the total population.

Judge Bowen: Is that the difference between the number of registered voters and the number of the gross population?

The Witness: Well, the census count on total resident population is 632,772.

Judge Bowen: I wish you would give me the figures. Have you got a paper and pencil? I want your figures, not mine. What is the difference so as to show the number of people that some may contend are not represented, as to whom there is not equal proportion or representation?

The Witness: Well, of course, it is simply by comparison of this total population with the registered number, roughly 430,000.

Judge Bowen: Does that represent, according to your statistical study, the number of people theoretically who are not represented by this redistricting to the extent that their representation in the legislature is equal to the representation of the needs of all other voters?

[fol. 731] The Witness: Approximately 430,000 persons would be excluded from the apportionment formula if it were based on registered voters. In other words, more than two-thirds of the population.

Judge Bowen: You may inquire. Thank you.

By Mr. Padgett:

Q. Now, Mr. Schmitt, did I understand correctly that under the census method an approach to this problem, if they happen to hit the census today when, say, they had 5,000 marines ashore on the north end of Molokai, that they would pick them up there?

A. That is a tough one to answer. If those marines were normally based, let us say, at Kaneohe Marine Air Corps Station, I suspect they would be allocated, too, since it is Tract 108, which is the Marine Air Corps Station. On the other hand, if they happen to be in a transient status, suppose they were being moved from a west-coast base to a forward area and were landed here temporarily, they would be assigned there. In the case of persons who have no other usual place of residence, either by virtue of being homeless people or by being reassigned from one job to another job in another geographic area and just passing through here on the census date, that is where they are listed.

Q. Next. Suppose on your census date you happened to have the fleet anchored in the Oahu roads—

Judge Pence: That is off the coast of Maui?

[fol. 732] The Witness: Yes.

Judge Pence: And that would be in reference to Lanai itself.

By Mr. Padgett:

Q. Would the personnel on board those ships be picked up in this district?

A. Theoretically, yes. I think that the practical matter probably would be that somebody in the Census Bureau would simply switch them back to Pearl Harbor if that is where they came from.

Q. I thought your testimony here in Exhibit A states with reference to ship's crews that the total population excludes ship's crews that may be home-ported in the area but temporarily outside of the area. And instead, it apparently includes ships that are temporarily, the personnel are included in the place where they temporarily are in port.

A. By census definition, a ship's crew that is in port on the census date is so enumerated on this port. I was thinking here that perhaps such a ship's crew might have been simply on a cruise from Pearl Harbor and in theory they had just been enumerated if they were in Lahaina Roads in Lahaina.

Q. Now, if one of the large British ships such as the Oronsay were in a Honolulu port, that crew is picked up in the census figure, is it not, even though there may be no United States citizens among the crew?

A. I would have to check into the enumerator's reference [fol. 733] manual on this. And I frankly, if I find any information on it—there will probably be some information back in Washington as to how they would treat those. I would suspect that they would include only those American citizens aboard the ship. But I had better not say anything on that. I am not sure.

Judge Pence: There are statistics which actually exist. For instance, the Second and Third and Fourth and Fifth Marine Divisions, for example, during the war were sta-

tioned in the Waimea District on the Big Island or on Maui. These are facts which actually exist in Hawaii.

By Mr. Padgett:

Q. Turning to what your Honor has suggested, as I take it, the military personnel currently stationed at the time of the census at Schofield Barracks is picked up and carried in the Fifth Senatorial District—

A. It is.

Q. And if a marine division were stationed on one of the other islands, such as on the Island of Hawaii, on the census day, that population would be picked up and carried as a part of the population of that particular place?

A. That is true. There were 285 Armed Forces on the Big Island at the time of the census.

Judge Pence: 285,000?

The Witness: No, 285 persons.

By Mr. Padgett:

Q. They took no census during the war, but if they did [fol. 734] take a census at the time that you had one or two divisions on the island, it would throw the population figures very far out of kilter, wouldn't it?

A. Well, the Census Bureau, as of July 1 of each year, makes an estimate which is supposed to be completely comparable with the centennial census count. Well, they didn't publish such during the war. At the end of the war, they did go back to 1940 and for each year thereafter. It is rather interesting to note that the population of the Territory of Hawaii on July 1, 1944, was well over 800,000, far more than it is today, and included 407,000 members of the Armed Forces.

Q. And is that estimate broken down by anything other than the Territory of Hawaii at large?

A. Simply a grand total.

Q. So that you can't get an estimate, for example, what the population of the Island of Hawaii was at that time?

A. No. We do have a breakdown on Armed Forces by island for the years beginning at 1959, at every six-month interval, based on our own surveys.

Judge Pence: Are we to understand that the census dates, instead of being every ten years, presupposing that on the census date of July 1944, presupposing that the re-apportionment was taken beginning as of that beginning date, then if I understand you correctly, on that date there would have been some 407,000 members of the Armed [fol. 735] Forces in the State of Hawaii?

The Witness: Yes.

Judge Pence: And out of a round total of 800,000?

The Witness: About 850,000.

Judge Pence: So the Armed Forces run on that basis, would provide a reapportionment basis of almost half of the electoral districts?

The Witness: That is so.

Judge Bowen: How many of that 230,000 that you spoke of a few moments ago in response to my question would that military population account for?

The Witness: In 1960, the number of members of the Armed Forces, the total number of members of the Armed Forces was either 54,000 or 47,000, depending—the census count was 47,000, and the Department of Defense counted 54,000.

Judge Bowen: I wish to say that in my question I speak of military dependents and military persons, and that is what I mean, to include all of those persons because of the military service.

The Witness: They were in addition.

Judge Bowen: Only during that time.

The Witness: The number of military dependents as of April 1st, 1960, the census date was, according to the local commanding officer,—and this figure is not available to the census,—but according to the commanding officer, it is

[fol. 736] slightly in excess of 60,000. Today it is slightly in excess of 69,000.

Mr. Padgett: I have no further questions.

Judge Pence: Does the Attorney General have any questions?

By Mr. Kanbara:

Q. Mr. Schmitt, with respect to the military household heads in Hawaii, you mentioned that about 8.0 per cent were born in Hawaii, about 71 per cent have been in Hawaii at least one year, which would indicate that on the basis that you are eligible or you might be eligible to vote if you have physically been in the islands one year; that roughly 79 per cent of them might possibly be eligible to vote.

A. Well, I won't say that. Those figures aren't administrative. But based on the number who have been here one year, it is about 71 per cent of the military household heads. Now, this excluded at that time approximately 30,000, I would say, probably 35,000 who were not living in households. That is, the barracks population. I suspect they are more mobile group and they would have a much lower proportion, they would be a much lower proportion of Armed Forces who have been here more than a year. However, the 23,900 military household heads, that is, servicemen living in regular housing units, in houses or apartments such as Capehart or in private housing, of which there were quite a number, of that number, 71 per [fol. 737] cent had been here at least a year.

Q. Now, with respect to the inclusion of all Armed Forces personnel stationed on board ships, the inclusion of these people, the same practice is followed in San Diego, California, say, or in Norfolk, Virginia, or Rhode Island.

A. That is true. In fact, the proportion of Armed Forces in other states in a number of cases exceeds that of Hawaii. In Virginia, for example, there is a very high concentration of Armed Forces. In Alaska it is almost phenomenal, a drastic proportion of the population consist of either

members of the Armed Forces or dependents. The United States Congressional reapportionment each decade is based on total population.

Judge Pence: What would be the percentage in Alaska, approximately?

The Witness: I don't have the figures handy but including dependents, I believe it is close to 40 per cent now.

Judge Pence: Of the total population of Alaska?

The Witness: That's right.

Mr. Kanbara: Thank you very much.

Mr. Padgett: Your Honor, might I ask one question on Exhibit 1 that I didn't cover?

Judge Pence: Yes, Mr. Padgett.

[fol. 738] By Mr. Padgett:

Q. Turning to Exhibit 1, Mr. Schmitt, and looking under the area, the portion designated as the Senate—

Judge Pence: What page is this?

Mr. Padgett: Exhibit 1.

Q. (Continuing) —I note that you carry the 1st District in Hawaii in the 1960 Census as having 44,297 population; and in the 3rd District on Maui as having 42,855 people. And yet you give the 1st District one Senator and the 3rd District two. Can you explain how this is consistent?

A. Yes. Assuming this isn't a typographical error,—and this was typed by the Office of the Attorney General and I doubt if it is an error—but there is a certain modification in the method of equal proportions used locally and specified by the State Constitution; that is, that there is first to be a reapportionment based on four basic areas. This was read, I believe, for the record yesterday in the pretrial, in which the four counties, including Kawaihau, which is part of Maui County, each represents a basic area. There is then an apportionment by district within these areas. Now, this can cause considerable hardships to a place like, taking the House districts, for example, a

place like Hilo which, because there are a number of very tiny population-wise districts elsewhere on the island, the island gets only so many of the population in the method of equal proportion, and then these form the new basis for [fol. 739] reapportionment within the district, separate districts of that county. That is also true, I believe, of Senatorial districts in which there is the additional provision that no district have fewer than one. Maui constitutes a single Senatorial district, but the Big Island has two Senatorial districts, which is different in population. One is a rather large population, population-wise, and the other quite small. This has resulted in contradictions and resulted in apparent computations which—

Q. Well, do I take it that what you are saying is that your column entitled "Reapportionment by Method of Equal Proportions," is based on—I should say is not based in fact on population alone but has some other factors added in?

A. It is based on the method specified in the State Constitution as to doing this in two stages; that is, first, by basic area, and, secondly, by district within each basic area.

Q. I thought this was applied in the State Constitution to the House of Representatives?

A. I know it is in the State House of Representatives. I am not sure about the Senate, I must confess at this point. You are quite right there. As to the Senate—I believe we were simply following the procedure established for the House in the State Constitution.

Q. And applying it to the Senate in there?

[fol. 740] A. Yes.

Mr. Padgett: No further questions.

Judge Pence: Mr. Kanbara?

By Mr. Kanbara:

Q. Mr. Schmitt, do you have figures corresponding to the Senate figures here, that is, the reapportionment for

each Senatorial district on the basis of the 1960 population, not applying the one for each basic area formula; that is, going directly on the method of equal proportions on the basis of the population?

A. Taking six districts and the method of equal proportions?

Q. Yes. Without first allocating one to each district.

A. For each, on the basis of total population, I do not have those handy. I believe I have such computations in my notes in my office and I could bring them at a later time.

Q. And allocating one to each basic area first, that is the reason that you have the discrepancy between the 1st Senatorial District in Hawaii and the 3rd Senatorial District?

A. In a sense that is the case.

Q. For example, in the 4-3-2 formula that has been set out in House Bill 3, the application of that in a sense might—

A. This was simply the use of ground rules, so to speak, that may not have been applicable. Each time that I went through these computations, I asked whoever was request- [fol. 741] ing the tabulation on what basis to do this. And we didn't cover all possible combinations, I'm afraid in this particular case.

Q. My question is the reason for the discrepancy here, the allocation of one senator to each basic area without regard to population.

A. No. This was not done. The discrepancy occurs when you are doing it in two stages. That is, first allocating by county and then allocating by district within the county. However, there is the further problem that we always followed in the State Constitution with regard to the House, that each district was to receive a minimum of one. Now, this is not the four off the top, so to speak, a practice recommended by the Senate. This simply means that you give one regardless, and then start on the second line in the case of the priority numbers.

Judge Jertberg: For the purpose of the record, we have been talking about this and this and this. I assume the questions were directed to Plaintiff's Exhibit No. 1, isn't that right?

Mr. Kanbara: That's right.

Judge Jertberg: And the discrepancy you are talking about relates to the first and the third under the heading of the Senate, isn't that true?

Mr. Kanbara: That's correct.

Judge Jertberg: That is what you were talking about?

[fol. 742] The Witness: Yes.

Judge Pence: Based upon the reapportionment method indicated on Exhibit 1 for the Senate, which we have been just discussing, you say, then, that under that, under the equal reapportionment, under the method of equal reapportionment, that the 1st Senatorial District of Hawaii would be giving to each voter there the same proportion in the representation that would be given to the voters in the 3rd, namely, Maui?

The Witness: This was computed, as I said, by the method proposed for the House in the State Constitution, and using this modification of it, this apparent anomaly occurs. There are many of these modifications, in fact, that can be applied to the basic method, the method of equal proportions. And it can create a vast number of possible variations in the number of representatives, depending on whether you specify a minimum of one or a minimum of zero per district, whether you do it in one stage or two stages, and what base you use on the registered voters.

Judge Pence: Mr. Funaki, do you have any questions?

Mr. Funaki: No, your Honor.

Judge Pence: Do I understand you correctly, Mr. Schmitt, that you have worked out or are working out a schematic working map showing the twenty-five Senatorial Districts and fifty-one Representative Districts with substantially similar populations?

[fol. 743] The Witness: That is true.

Judge Pence: Is this redevelopment on the basis of the total gross population of the State?

The Witness: Yes.

Judge Pence: According to the 1960 Census?

The Witness: Yes, that is.

Judge Pence: Have you also worked out any schematic map based on total registered votes?

The Witness: No, because we had not been instructed to do so and we have not.

Judge Pence: After you worked out any such schematic maps, based upon the table, Table 1 of Exhibit A, namely, on the basis of those eligible to register?

The Witness: No, because the information was not available. It is a small area.

Judge Pence: Would it be reasonably possible to work out such a schematic map showing the 25 Senatorial Districts and 51 Representative Districts based upon those eligible to register as you work out the same table?

The Witness: The statistics, I'm afraid, are not available in sufficient detail to do it with enough accuracy for the purposes of this Court.

Judge Pence: Do I understand that you are saying that with the statistics which are available or can be with reasonable effort made available it would be, in your opin-[fol. 744] ion as an expert, practically impossible to redistrict the Senate and the Representative Districts of the State on the basis of those eligible to register?

The Witness: We can do this by counting, but not for any smaller district. In other words, we can indicate how many there would be in Oahu, how many from Hawaii County, how many on the Big Island, how many from Kauai County. We cannot do it by district, that is, by representative district except in the case of the 6th and 3rd District, we cannot do it by senatorial districts.

Judge Pence: In your opinion, presupposing that in 1970 such information is requested of the Census Bureau, could a formula be set up whereby through the Census

Bureau such information could be developed and redistricting be made even on the House and Senate Districts in smaller areas?

The Witness: I can only answer with regard with what actually happened in New York State where New York, as I understand it, has a requirement that apportionment is to be based on citizenship; that is, the number of American citizens.

Judge Pence: That term American citizens, whether they are able to vote or not?

The Witness: That's right.

Judge Pence: This includes the children?

The Witness: Exactly.

[fol. 745] Judge Pence: The mentally incompetent, and so on, as you understand it?

The Witness: Yes.

Judge Pence: Proceed.

The Witness: And the Census Bureau was asked to bring census statistics on citizens as well as other characteristics normally obtained. And they agreed to do so and quickly expanded, added a couple of questions to the census schedules for New York State in which they asked citizenship. I believe it was on a hundred per cent enumeration basis. Please understand that the Census can only ask seven questions of each person. All the rest of the information is either, in the census, is either on 25 or 5 per cent sample basis. So this is a big item because it was asked of each person. And they charged the State of New York, I believe, $400,000 for this additional information. It was then used, at least intended to be used, by the State of New York for redistricting or reapportionment. I assume they would be willing to do it for the State of Hawaii if we were willing to pay for it.

Judge Pence: You have indicated that you will attempt to secure a sample copy of the map?

The Witness: Yes, sir.

Judge Pence: So that you may expect to be called back in the next 24 hours for a discussion on that. Are there

any questions from any other attorney? Subject to the [fol. 746] right of recall, Mr. Schmitt, you are excused.

The Witness: Thank you.

* * * * * * *

[fol. 747] ROBERT SCHMITT, a witness called by the Plaintiffs, having previously been sworn, resumed and testified further as follows:

OFFERS IN EVIDENCE

Mr. Tonaki: Your Honor, may we have these maps marked for identification?

Judge Pence: Mr. Clerk, what is the next exhibit number in order?

The Clerk: Exhibit 5, Plaintiff's Exhibit 5.

Judge Pence: Exhibit 5 being a map of the City and County of Honolulu. Is there any objection from any party? Well, we will withhold that question until later. [fol. 748] Exhibit 5 for identification, a map of the City and County of Honolulu.

Mr. Padgett: It is the City only.

Judge Pence: Pardon me. I am wrong. The City of Honolulu. And it is not the Territory of Hawaii either. And the Island of Maui will be Exhibit 6 for identification.

The Witness: Incidentally, there are several maps under that Maui map showing the remainder of Maui County.

Judge Pence: Perhaps they should be marked. The one on top will be marked 6-A, the one right under it, still referring to the Island of Maui, will be 6-B. How many more?

The Witness: There are two, I believe, two maps under there.

Judge Pence: All pertaining to the Island of Maui?

The Witness: County of Maui.

Judge Pence: County of Maui?

The Witness: One is Wailuku-Kahului and the other is Molokai-Lanai.

Judge Pence: 6-B will be the Island of Molokai.

The Witness: Well, the second one, the one immediately under Maui Island is an inset map for the urban area that is marked in the cross-hatching there and then the bottom map of the three is Molokai and Lanai.

Judge Pence: 6-C is Molokai and Lanai.

(The maps referred to were marked as Plaintiff's Exhibits 5, 6-A, 6-B, and 6-C for identification.)

[fol. 749] Judge Bowen: Mr. Witness, did you say that 6-B is a map showing the urban area of Maui?

The Witness: That's right, Wailuku and Kahului.

Judge Pence: Then we come to Exhibit 7 for identification, which would be which one, Mr. Tonaki? Which do you want as Exhibit 7?

Mr. Tonaki: The Island of Hawaii.

The Witness: That is the proposed redistricting map of the Island of Hawaii.

Judge Pence: That will be explained? And Exhibit 8 for identification, what does it purport to be?

Mr. Tonaki: Maui County.

Judge Pence: Maui County? I am going to arbitrarily call that map of Maui County Exhibit 6 for identification. Then 6-A becomes the Lahaina side of the Island of Maui. The one called the Island of Maui.

The Witness: The large one?

Judge Pence: That is the entire island.

Mr. Tonaki: Yes.

Judge Pence: That will be the Island of Maui.

The Witness: Where is the one mentioned as the County?

Judge Pence: 6-A, B, and C, the Molokai and Lanai, and then Exhibit 8 on the right.

The Witness: The Island of Oahu, Exhibit 8 for identifi-
[fol. 750] cation.

(The map referred to was marked as Plaintiff's Exhibit No. 8 for identification.)

Direct examination (Continued).

By Mr. Tonaki:

Q. Mr. Schmitt, will you explain to the Court what Plaintiff's Exhibit No. 5 for identification purports to show?

A. The map of the City of Honolulu, as an enumeration district and census tract map of the City of Honolulu for the 1960 United States Census. This map was prepared on a base supplied by the City and County of Honolulu, and using work maps supplied by the U. S. Bureau of Census. The heavy lines show census tract boundaries. The lighter lines within these larger areas represent the boundaries of enumeration districts. As I mentioned in my testimony yesterday, the census tract is the basic small statistical area for which census statistics are routinely published in census bulletins. It averages about three or four thousand in population. There are 113 such census tracts on the Island of Oahu. Tract 144, the remainder of the County, of the City and County of Honolulu, is French Frigate Shoals.

Each tract consists of one or more enumeration districts. An enumeration district is the area covered by a single census enumerator. It averages about 800 in population [fol. 751] and there are somewhat under 1,000 such enumeration districts in the State of Hawaii. Although statistics are tabulated by enumeration district, they are not published unless requested by a local government agency or a private firm willing to pay for this special tabulation.

The map shows not only the boundaries but I believe the population totals. If not on the map, those are available in separate form, a set of the total populations for each of the enumeration districts.

Mr. Tonaki: Your Honor, we offer Plaintiff's Exhibit No. 5 marked for identification into evidence.

Judge Pence: Any objection?

Mr. Padgett: I would like to ask one question on voir dire.

Voir dire examination.

By Mr. Padgett:

Q. You say there is a census tract for the French Frigate Shoals?

A. Tract 114 includes all islands of the City and County of Honolulu, other than Oahu. It includes Kure, French Frigate Shoals, Necker, Nihoa, and so on. The only populated island at the time of the census was French Frigate Shoals, which had 15 Coast Guardsmen.

Q. What representative district are they included in?

A. In the 17th, according to the State Constitution.

[fol. 752] Judge Pence: Any other questions on voir dire? Any objections? There being no objections, Exhibit No. 5 for identification is received in evidence as Plaintiff's Exhibit No. 5.

(The map referred to was received in evidence as Plaintiff's Exhibit No. 5.)

By Mr. Tonaki:

Q. Mr. Schmitt, on Plaintiff's No. 6 marked for identification—

Judge Pence: 6 is your County of Maui on the lower right-hand corner.

Q. (Continuing) —What does Plaintiff's Exhibit No. 6 purport to show?

A. The one at the lower right, that is a map of Maui County, which is on a base, I believe, prepared by the Department of Transportation. It shows a set of preliminary proposals for representative and senatorial districts based on total population, 1960, from the Census; using census county division lines and census county division population totals as the basic components from which the proposed districts were developed. This was done in response to a request from Governor Burns for a beginning for a preliminary allocation for his consideration. It has no official

status. He has not approved this. It is simply shown here as an example of a possible districting. The work was per-
[fol. 753] formed by Robert Souza of the Department of Planning and Economic Development under my general supervision. Mr. Souza is one of the spectators, incidentally, and can answer any detailed questions on this. The major criterion was substantial equality of population, although an effort was made to show areas as compact and as contiguous as possible. Of course, contiguity is rather awkward when there are four islands in the County, and three of those have insufficient population for a single representative district. If we wish close similarity of the total population among the districts—

Judge Pence: When you use the term "population," you are talking of total or gross population, census population?

The Witness: The total population as reported in the Census. In the case of Maui Island or Maui County, there is very little difference.

Judge Pence: Wait. Maui Island or Maui County?

The Witness: Well, this is true of the county as a whole and of the island forming Maui County. They tend to be relatively homogeneous in population composition and have relatively few military stationed there or included in the Census.

Mr. Tonaki: Your Honor, we offer Plaintiff's Exhibit 6 marked for identification into evidence.

Mr. Padgett: You described Exhibit 6 as including the
[fol. 754] County of Maui.

Judge Pence: Are there any objections? Exhibit 6 for identification is received in evidence as Plaintiffs' Exhibit 6.

(The map referred to was received in evidence as Plaintiffs' Exhibit No. 6.)

By Mr. Tonaki:

Q. Now, will you explain Exhibit 6 marked for identification?

A. I believe we are now discussing the large map of Maui. This map was prepared by the Department of Transportation, using a base map developed as part of the State Highway Planning Survey, and showing census tracts and enumeration district boundaries devised by the U. S. Bureau of the Census for the 1960 Census of Population and Housing. These boundaries were transcribed from more detailed work maps supplied by the Bureau of the Census. This map has just been completed. It was completed at the request of the State Senate.

Mr. Tonaki: I now offer Exhibit 6-A.

Judge Pence: Any objection? There being no objection, Plaintiffs' Exhibit 6-A for identification is received in evidence as Exhibit 6-A.

(The map referred to was received in evidence as Plaintiffs' Exhibit No. 6-A.)

By Mr. Tonaki:

Q. Will you now explain Plaintiffs' Exhibit 6-B for [fol. 755] identification?

A. 6-B consists of a map which is in effect an inset from the preceding exhibit. It shows the more urbanized area of the Island of Maui, chiefly the City of Wailuku and the City of Kahului. This inset was prepared to show greater detail because of the smaller districts in it, densely settled area. It was like the former map prepared by the Department of Transportation, using a base of its own preparation and showing enumeration districts and census county division boundaries from the 1960 U. S. Census.

Mr. Tonaki: We offer Plaintiffs' Exhibit 6-B for identification into evidence.

Judge Pence: Any objection? Voir dire? There being none, 6-B for identification is admitted into evidence as Plaintiffs' Exhibit 6-B.

(The map referred to was received in evidence as Plaintiffs' Exhibit No. 6-B.)

By Mr. Tonaki:

Q. Now, will you explain Exhibit 6-C for identification?

A. 6-C shows the remainder of the Maui County, plus Kahului. It is a map of the Island of Molokai and Lanai.

Q. Is it similar to 6-B?

A. It is. I might add that the only missing part of the County now is Kahoolawe, which does not appear on this map but has a population of zero.

[fol. 756] Mr. Tonaki: We offer Plaintiffs' Exhibit 6-C marked for identification into evidence.

Judge Pence: Any voir dire? Objections? There being none, Exhibit 6-C is admitted into evidence as Plaintiffs' Exhibit 6-C.

(The map referred to was received in evidence as Plaintiffs' Exhibit No. 6-C.)

By Mr. Tonaki:

Q. Will you explain Plaintiffs' Exhibit 7 for identification?

A. Exhibit 7, I believe, is the map of the Big Island shown there. This map was prepared by the Department of Planning and Economic Development.

Judge Pence: Excuse me. The Big Island is the Island of Hawaii?

The Witness: Hawaii, which is co-terminus with the County of Hawaii, an island of 4,021 square miles, a population of approximately 60,000. This map shows, as did the map of Maui County previously discussed, a set of preliminary and unofficial proposals for representative and senatorial districts for the County of Hawaii, in which the lighter lines show proposed representative districts and the heavier lines senatorial districts. With respect to this map, which was prepared in my Department—shall I point out one difference between this and the other maps in the same series? The Island of Hawaii under the method of equal

[fol. 757] proportions, and using the 1960 Census population total as the basis, emerged with an odd number of representative districts. In all other counties, it was possible to combine adjacent pairs of representative districts to form senatorial districts, quite neatly. In the case of the Island of Hawaii, because there was an odd number of representative districts, it was impossible to nest, so to speak, each representative district as one of a pair of senatorial districts. As a result, one of the representative districts extends across a senatorial district line.

Mr. Tonaki: We offer Plaintiffs' Exhibit No. 7 marked for identification into evidence.

Judge Pence: Voir dire? I have one, two, or three questions in connection with the Island of Hawaii. I take it that on Exhibit 7 for identification, in attempting to set up your senatorial districts, you have not attempted to use the entire as a whole as one senatorial district but rather to set up two senatorial districts therein?

The Witness: Yes, sir, because of the procedure used, the method of equal proportions, and the stipulation by the Governor in requesting this work, that each district have one representative and each representative district and each senatorial district one senator. This meant that there were two senatorial districts and five representative districts on the Island of Hawaii.

Judge Pence: In your study of the history of the Island [fol. 758] of Hawaii, did you find any indication that in the entire time there has been but one senatorial district in the entire island?

The Witness: I'm sorry—

Judge Pence: When you studied the history of the Island of Hawaii, did you come across any indication that at one time the entire island was but one senatorial district?

The Witness: I am aware only of the existence of the 1st and 2nd Senatorial Districts.

Judge Pence: At the present time, how many Senators are in the 1st Senatorial District?

The Witness: There are, I believe, two in the 2nd.

Judge Pence: And in laying out Exhibit 7 for identification, you didn't endeavor to divide it into senatorial districts?

The Witness: That's right.

Judge Pence: And how many would you have had in the Senatorial District No. 1—what population, roughly?

The Witness: Well, each of these senatorial districts has approximately 30,000 population. Now, on a statewide basis, the population per senatorial district worked out to a total more than 25,000, because on the Big Island we made this in two stages specified for representatives in the current State Constitution, which means that the Big Island emerged with two senators, and somewhat greater popula-
[fol. 759] tion per senator than was the average.

Judge Pence: Any other questions on voir dire? Any objections? Exhibit 7 for identification is received in evidence as Plaintiffs' Exhibit No. 7.

(The map referred to was received in evidence as Plaintiffs' Exhibit No. 7.)

By Mr. Tonaki:

Q. Will you explain Exhibit No. 8?

A. Exhibit No. 8 is proposed districting, like the preceding exhibit, but for the City and County of Honolulu. This is the one to the far right.

Judge Jertberg: Would you repeat that?

The Witness: This shows a preliminary proposal for the redistricting for the City and County of Honolulu. It is based on total population in the 1960 Census. Like the preceding ones, first there was a two-stage allocation of the number of representatives and senators. The first, as mentioned, by County. This gave Oahu twenty senators and forty representatives, based on the total population. We then split the island into twenty senatorial districts and forty representative districts, each representative district

being paired with adjacent representative districts to form a senatorial district. As in the previous one, the primary consideration was substantially quality of population. The boundaries were drawn along census tract lines using published statistics for census tracts to give total population.

[fol. 760] Judge Pence: Excuse me. Did you not yesterday testify that the present redistricting is not along tract lines?

The Witness: That is true. The present districting is completely different. In this, the largest representative district in point of population is the one that includes Schofield Barracks. In fact, it is completely Schofield Barracks.

Judge Pence: Will you point that out, which one is that?

Mr. Kobayashi: This one. (Indicating)

The Witness: No, above that. I believe to the left of that.

Mr. Kobayashi: Right in here. (Indicating)

The Witness: Yes. And Schofield is the largest one that extends to the left of that, up into the Waianae mountains. Exactly. That one, yes. (Indicating)

Judge Pence: What is the number there?

Mr. Tonaki: 33.

The Witness: The numbers, incidentally, assigned to these are simply arbitrary numbers used for reference purposes in the office. That tract had a total population of somewhat over 14,000. It was the largest representative district and could not be broken down further because not only does it constitute a complete census tract but it is also a single enumeration district. The number of registered [fol. 761] voters I am sure would be considerably less.

Judge Pence: Can you give us an approximation of the number of registered voters in that area, No. 33, as indicated?

The Witness: I do not have that information.

Judge Pence: Can you give us an educated guess?

The Witness: I am sure that it would be in point of registered voters the smallest district on the island.

Judge Pence: Yet in point of total population, because it includes the military, it would be the largest?

The Witness: Over 14,000 members of the Armed Forces. I understand that at that time the population was at low ebb, that it was not at full strength. There were civilians in the area. Of course, most of the civilians were dependents of the Armed Forces. There are somewhat 2,000 housing units built a few years ago as part of the Capehart Act Housing Program. There are also presumably a few civilians who are employees of the Armed Forces rather than dependents.

Mr. Tonaki: We offer Exhibit 8 marked for identification into evidence.

Judge Pence: Voir dire? Objection? There being none, Exhibit 8 for identification is received in evidence as Plaintiffs' Exhibit No. 8.

(The map referred to was received in evidence as Plaintiffs' Exhibit No. 8.)

[fol. 762] Mr. Tonaki: I have no further questions.

Judge Pence: Mr. Dodge?

Mr. Dodge: No questions.

Judge Pence: Mr. Padgett?

Cross examination.

By Mr. Padgett:

Q. You said Exhibit 6-A was prepared at the request of the Senate?

A. The enumeration district map of Maui, I believe you are referring to, the large map of Maui up there.

Q. Yes.

A. Yes, that was prepared at the request of the Senate, and also approximately at the same time, the Governor requested the same information.

Q. Had this been shown to the Senate?

A. It was just finished, and at the request of the Court, was brought in here.

Q. So the answer is no?

A. No, that is true.

Q. How about the others? At whose request were each of the others prepared? Let's begin with 5. That is the City of Honolulu.

A. Oh, yes, that, like the map of Maui, was prepared by the Senate. All of these have just been completed.

Q. They were prepared at the request of the Senate but [fol. 763] have just been completed and not been submitted to the Senate?

A. That is true.

Mr. Padgett: I have no further questions.

Judge Pence: Mr. Funaki?

Mr. Funaki: No questions.

Judge Pence: Mr. Kanbara?

Mr. Kanbara: No questions.

Mr. Tonaki: Your Honor, if I may, I would like to have him explain the omission of the Island of Kauai.

Judge Pence: Go ahead.

The Witness: The enumeration district map of Kauai, I believe, is complete, too, at this time or just about complete. The Department of Transportation has been working at top speed. There was a delay, as I mentioned earlier, because certain maps required to complete this, which were supposedly in the island, were found to be missing and we had to send to Washington for these maps. The Court had asked only for selected maps as a sample of what was being done. Hence, I did not bring the enumeration district map of Kauai. With regard to the proposed districting of Kauai, it so happened that these were the only maps for which we had copies run off, that is, prints had been made, final prints. We have the tracing for Kauai. And it wasn't immediately available. I don't know whether there was any great urgency—I didn't know whether there was any great urgency to bring that. However, I can explain [fol. 764] the districting for Kauai.

It consists of a single senatorial district covering the entire County, and the four islands of Kauai County, namely, Kaula, Nihoa, Niihau, and Kauai.

Judge Pence: And the population, please?

The Witness: The population of Niihau is about 250 at the time of the Census. The remaining population of Kauai County is slightly over 28,000, and was on the Island of Kauai.

Judge Pence: The other two islands you mentioned have no population?

The Witness: They were unpopulated. The two representative districts were roughly the 1st which consisted of Hanalei, Kawaihau, Lihue, and part of Koloa district, the part adjacent to Lihue. The remainder of Koloa District, including Niihau Island and the other minor islands, formed the 2nd Representative District. Each representative district had a population of approximately 14,000.

Judge Pence: For the benefit of the record in this case, —and you know these were illustrative of the work being done and of the problems involved—may we mark the map of the County of Kauai as Exhibit No. 9 for identification, and if there are no objections, after all parties have had a chance to see it, it will be admitted now.

The Witness: You are referring to the proposed dis- [fol. 765] tricting map?

Judge Pence: Yes, proposed districting map, Exhibit No. 9 will be the County of Kauai, the districting map.

(The map referred to was marked as Plaintiffs' Exhibit No. 9 for identification.)

By Mr. Padgett:

Q. Mr. Schmitt, I would like to clear one thing up. Were not the Exhibits 7, 8, and now 9, the ones which show the proposed districting prepared by you at the request of the Governor?

A. That is true.

Q. And what disposition was made of that?

A. The Governor has not approved these when the Senate requested the maps, and the Senate in my testimony last

month asked to see the maps and the Governor authorized me to show them. However, they had no official status.

Judge Pence: Any other questions on voir dire? Any other questions?

Mr. Marumoto: May it please the Court, I have no intention of pecking at the witness, but I think I can clarify—

Judge Pence: Well, without clarification, do you have any questions?

Mr. Marumoto: Yes.

Judge Pence: Proceed.

By Mr. Marumoto:

Q. The Court asked you about the registration figure of [fol. 766] the district in which Schofield is located—

Judge Pence: That has been dentified as No. 33 on Exhibit No. 8.

Q. (Continuing) In the present delineation of districts, is that the 9th District on Oahu?

A. Schofield, I believe, under the State Constitution is part of the 9th District.

Q. And according to Exhibit 1, the 1960 population is 42,816, and the 1960 registered voters is 7,410. I think it is the lowest, is it not?

A. Which district is that last one?

Q. Ninth.

A. The number of registered voters was the smallest on Oahu.

Q. 7,410? And also in Defendant's Exhibit A, the population on the military base is 14,873, of whom 6,264 are civilians.

Judge Jertberg: Just a minute. What was the last exhibit you were talking about?

Mr. Marumoto: The last exhibit I was talking about is Defendant's Exhibit A.

Judge Jertberg: Exhibit A?

Mr. Marumoto: On page 3.
Judge Jertberg: On which page?
Mr. Marumoto: Page 3, paragraph 2.

[fol. 767] By Mr. Marumoto:

Q. Is Barber's Point in District 8?
A. It is in the 9th Representative—I'm sorry—it is the 10th, Barber's Point is in the 10th Representative District.
Q. And what other military base is in the 10th?
A. The 10th District includes a number of very large military installations, Hickam Field, Pearl Harbor Navy Shipyard, Camp Smith, the Marine Base, it includes Barber's Point Naval Air Station, and a number of somewhat smaller installations.
Q. Kaneohe is included in No. 8?
A. In the 8th Representative District.
Q. And according to Exhibit 8, it shows that Kaneohe has a population, military base population of 6,397, of whom 2,631 are civilians?
A. Yes.
Q. And in this tabulation on paragraph 2, you have the tabulation population of military bases in Schofield, Kaneohe and Barber's Point?
A. Yes, sir.
Q. And that makes up about 25,000, does it not?
A. Yes.
Q. And then the report here is that there were about 71,672; so that the balance of the 45,000 would be scattered over the other military bases?
[fol. 768] A. Yes. I can supply a complete listing, by the way.

Mr. Marumoto: That is all I have.
Judge Pence: Are there any other questions? Mr. Schmitt, how long after the 1960 Census was taken was it before all of the figures were available, for us, let us say, for the purpose of apportionment?

A. Are you referring to a preliminary count, advance count or a final count?

Judge Pence: Well, for the purpose of reapportionment, as an expert, which would you say would be the one that should be used?

The Witness: The final count, because this includes all the editing.

Judge Pence: When would that be available?

The Witness: The data for Hawaii were available on a small-area basis—

Judge Pence: Let us understand each other. When you use the term "small-area basis," you are talking about what?

The Witness: Census tracts or enumeration districts. And these were available in 1960 for the 1960 Census in the middle of 1961. I would expect that with continued improvement in computer technology, that even greater speed can be expected in 1970. The totals for larger areas are available sooner, by the way.

[fol. 769] Judge Pence: But on enumeration basis?

The Witness: In smaller areas basis, I would judge that the 1970 Census would be available probably in the spring of 1971.

Judge Pence: Presupposing the Legislature should meet at the same time as it now met, in the middle of February, would you as an expert forecast such material could be available to the Legislature meeting in the spring of 1971?

The Witness: I suspect that it would be a touch-and-go matter based on past experience.

Judge Pence: Now, how much time would you estimate it would take you, your staff, to set up a complete redistricting of the entire State in the nature of these Exhibits 5 through 8? You have indicated in these exhibits here—how much time alone would it take you and your staff to set up a proposed redistricting division, presupposing that you have the pertinent data available? In this case you have the gross population data.

The Witness: If we were basing this on total population and using the census tracts as the units which we would combine or use separately, this could be done within a week.

Judge Pence: Presupposing you were using registered voters as they now appear upon the rolls of the various counties?

The Witness: We would then, of course, have to use [fol. 770] precincts or existent representative or senatorial districts as the component of the new district. Of course, then it would probably take the same time and could be done following each general election, I suppose, as the data were supplied.

Judge Pence: But you feel you could turn out a division similar to the type you have indicated here?

The Witness: I think within a week, with a small staff of knowledgeable persons who know the geography of the islands.

Judge Pence: Do you have such a staff now?

The Witness: Yes.

Judge Pence: I have no other questions. Thank you very much.

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[fol. 771] OFFERS IN EVIDENCE

Mr. Tonaki: I have another exhibit being marked for identification.

[fol. 772] Judge Pence: Is it 11 for identification? It purports to be what?

Mr. Tonaki: It is a Standing Committee Report of the Constitutional Convention as extracted from the proceedings of the Constitutional Convention. It is a Standing Committee Report. I now offer that into evidence.

Judge Pence: Any objection? There being no objection, Exhibit No. 11 for identification is received in evidence as Plaintiffs' Exhibit No. 11, which purports to be a Standing Committee Report No. 92 of the Constitutional Convention.

(The document referred to was received in evidence as Plaintiffs' Exhibit No. 11.)

Judge Pence: What year was that?

Mr. Tonaki: June 23, 1952.

Judge Pence: Mr. Kanbara?

Mr. Kanbara: Your Honor, on the matter of housekeeping, we will introduce Exhibit GO-1 for identification.

Judge Pence: GO-1?

Mr. Kanbara: Yes, which shows the 1960 population and average population for the Legislature based on the 1960 Census. I will submit it in evidence.

Judge Pence: Is there any objection to the introduction of Exhibit GO-1, purporting to be a tabulation of the 1960 population according to the Senate and showing the average [fol. 773] 1960 population per legislator? There being no objection, the same is received in evidence as Exhibit GO-1.

(The document referred to was received in evidence as GO-Exhibit No. 1.)

Mr. Kanbara: Yesterday I quoted from the proceedings of the Constitutional Convention to show that the Constitutional Convention was considering the House and Senate as part of the entire package. And this is Intervenor Plaintiff's Exhibit marked GO-2 for identification, and it is now offered.

Judge Pence: Mr. Padgett?

Mr. Padgett: I don't object. No objection.

Judge Pence: Exhibit GO-2. Any objections?

Mr. Dodge: No objection.

Judge Pence: There being no objection, Exhibit GO-2 for identification is received in evidence as Exhibit GO-2.

* * * * * * *

[fol. 774] Mr. Tonaki: Your Honor, we have one more piece of evidence.

Judge Pence: Is this part of the Plaintiffs' case in chief?

Mr. Tonaki: Yes. This is a map of Kauai which was missing this morning.

Judge Pence: That was already introduced in evidence, even though it wasn't offered.

[fol. 775] Mr. Tonaki: I think it was marked for identification.

Judge Pence: It has already been received. That is Exhibit 9. My records show Exhibit 9 had been received. It is a map of Kauai. That is what it is, Mr. Tonaki.

Mr. Tonaki: Yes, your Honor.

Judge Pence: All right. Exhibit No. 9 is now in evidence. Now, Mr. Dodge.

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[fol. 776]

Excerpts from Transcript of Proceedings—January 11, 1965

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[fol. 777] OFFERS IN EVIDENCE

Mr. Tonaki: I have received a stipulation of the parties to this—to the following documents: One, is "Election Statistics of Hawaii," by the Department of Planning and Economic Development, dated October 15, 1964. That is—

Judge Pence: Exhibit No. 14. Any objection? No ob-
[fol. 778] jection. No. 14 is received in evidence.

(The document in question was marked and received in evidence as Exhibit No. 14.)

Mr. Tonaki: Next is another document by the Department of Planning and Economic Development, State of Hawaii, entitled "Military Personnel and Dependents in Hawaii," dated July 27, 1964.

Judge Pence: Call that Exhibit 15. Any objection to Exhibit 15? There being none, the same is received in evidence.

(The document in question was marked and received in evidence as Exhibit No. 15.)

Judge Beeks: Does that deal with Army, or with all of the Armed Services?

Mr. Tonaki: All of the Armed Services, Your Honor.

Next is a one-page—statistics relating to population by class for Hawaii, by legislative districts, 1960, also prepared by the Department of Planning and Economic Development.

Judge Pence: When was that prepared, do you know? Population by class.

Mr. Tonaki: I don't have any date on that, Your Honor.

Judge Pence: We'll call that one Exhibit 16. There being no objection thereto, the same is received in evidence as [fol. 779] Exhibit 16.

(The document in question was marked and received in evidence as Exhibit No. 16.)

Judge Beeks: I thought you said something about 1960 in connection with that exhibit.

Mr. Tonaki: Based on data in 1960.

Judge Beeks: I see.

Mr. Tonaki: Next, I have a map of the Island of Oahu showing Army, Navy, and Air Force installations; and also dividing the Island of Oahu into Senatorial and House Districts, with overlays to indicate where the Districts are.

Judge Jertberg: As presently existing?

Mr. Tonaki: That's right, Your Honor.

Judge Pence: Call that Exhibit 17. There being no objection, the same is received in evidence as Exhibit No. 17.

(The map referred to was marked and received in evidence as Exhibit No. 17.)

Mr. Tonaki: Next, I have a map of the 15 Representative Districts of the State of Hawaii, showing precinct boundaries, Your Honor.

Judge Pence: There being no objection—we'll call that one Exhibit 18. There being no objection thereto, the same is received in evidence as Exhibit 18.

* * * * * * *

[fol. 780] ROBERT SCHMITT, a witness recalled on behalf of the plaintiffs, resumed the witness stand, and testified as follows:

Judge Pence: This witness has already been sworn, being the same Robert Schmitt that gave us such fine information before.

Proceed.

Direct examination.

By Mr. Tonaki:

Q. Mr. Schmitt, do you have a copy of Plaintiff's Exhibit 14, entitled "Election Statistics of Hawaii"?

[fol. 781] A. Yes, I have.

Q. Did you prepare this Exhibit 14?

A. Yes.

Q. Will you turn to page 3—page 4, showing Table 3? There is a figure showing the population of Hawaii in 1960 to be 632,722 people. What persons, if any, does that figure exclude?

Judge Beeks: Just one moment. Table 4, you say?

Mr. Tonaki: Table 3, page 4.

A. This is the total resident population of the State, as defined by the Bureau of the Census. It includes all persons whose usual place of residence is in the State, including all Armed Forces, and who were in the State on April 1st, 1960. It excludes no one whose usual place of residence was in the State, unless you would consider, say, Hawaii-born persons in the Armed Forces stationed out of Hawaii. However, those are, by census definition, enumerated at their place of actual location on the census date. So that this is a true total.

Judge Jertberg: It's what we call "gross population"?

The Witness: Yes.

Mr. Tonaki: Yes, sir.

By Mr. Tonaki:

Q. Mr. Schmitt, you have broken down that total population into Senatorial and House Districts. Are those [fol. 782] figures by actual count, or estimates?

A. The Senate Districts are the actual populations since Senatorial Districts follow statistical District lines. In the case of the House, wherever a House District is defined by a boundary that does not quite follow a census statistical boundary—that is, a census tract or enumeration district line—it was necessary to make an estimate. This happened in several of the Representative Districts.

Q. What margin of error did you estimate in your estimates?

A. Well, for those Districts where an estimate was necessary,—as an example, I might cite the boundary between the 15th and 16th Districts, which runs down part of St. Louis Heights—for the total District as a whole, I would not consider it a very sizeable error. Certainly no more than 5 percent of either of the Districts which had to be estimated.

Q. Will you turn to Table 4 on page 5? On that table, you have "U. S. Citizens of Voting Age." What persons have you excluded in that category, if any?

A. All persons—well, now, are we referring to the entire series from 1900 to date? Or simply to the—

Q. Take 1960.

A. 1960. In 1960 it excludes all population under 20 years of age, and aliens. The number of aliens in the case of 1960 had to be estimated from data supplied by the U. S. [fol. 783] Immigration and Naturalization Service on aliens; and the age and sex distribution of the foreign-born population from the census.

Q. Did it include military personnel of voting age?

A. Yes, it did.

Q. Will you turn to Table 5 on page 6? You have a column showing the population of the State of Hawaii, age 20 and over. What persons have you excluded, if any?

A. Persons under 20 years of age only. It includes all persons, regardless of military status, who are 20 and over, and who are normally residents in the State of Hawaii.

Judge Beeks: The only difference between that and the previous one, then, would be dealing with alien population?

The Witness: That's right.

By Mr. Tonaki:

Q. Are the figures in "Population 20 and over" by actual count, or estimates?

A. That is by actual count, in that first column.

Q. In the next column, you have those eligible to register as of April 1st, 1960. Is that by actual count, or by estimate?

A. That's by estimate.

Q. What margin of error do you estimate in that?

A. Probably no more than 5 percent, in a maximum.

Q. Will you turn to Table 6 on page 7? You have a [fol. 784] column showing "Non-U. S. Citizens 20 Years or Older." Is that by actual count, or estimate?

A. The State-wide total is based on a total supplied by the Immigration and Naturalization Service, but distributed by age and sex and geographic location on the basis of an estimate.

Q. In the next column, you have "Residents Less Than One Year." Is that by actual count or estimates?

A. That's based on estimates.

Q. Going two columns over, you have "Data Showing Military Personnel." Is that by actual count, or estimate?

A. The figures in that column are estimated from an actual total. That is, to get the "Under 20," it was necessary to make an estimate.

Q. How about the military dependents? Is that an actual count or estimate?

A. The same is true there. That is, we had a total count on the number of military dependents in Hawaii, but it

was necessary to estimate the number of those that were 20 and over.

Q. Now, as to those military personnel and military dependents, do those figures include those who may be eligible to vote?

A. These are all military dependents 20 and over in the State of Hawaii, regardless of where they're registered to [fol. 785] vote. So it might include some Hawaii eligible persons.

Q. Will you turn to Table 7 on page 8? You have shown an estimated number of persons eligible to register to vote in Hawaii elections; and as in the previous table, you have excluded military personnel and military dependents, or declared them to be ineligible. Do they include persons who may be eligible to register?

A. In the two lines there, "Military Personnel" and "Military Dependents," I have included all military and dependents 20 and over in the State, regardless of where they may be registered.

Q. Now, in summary, Mr. Schmitt, what accurate figures do you have relating to gross population as against military population?

A. We have detailed information on the total population —total resident population, gross population—by small geographic areas for 1960. On military population, we have less detailed information, and certainly not by age; by geographic area.

Q. Can you segregate the population of the military bases from the gross population?

A. In total—well, we can segregate the total population on base, which may include civilians, from the total population.

Q. Can those figures be segregated according to legis- [fol. 786] lative Districts?

A. They can.

Q. How about all—

Judge Pence: May I have that read back—that last question?

(The question and answer were read by the reporter.)

By Mr. Tonaki:

Q. Can you get accurate figures, deducting all military personnel and dependents, regardless of where they live, from the gross population?

A. We can get 1960 data on Armed Forces regardless of where they live, and delete them. We cannot subtract the dependents because we do not have good statistics on the geographic distribution of military dependents.

Q. Now, when you speak of "Military" and "Military Dependents," do they always include those who may be eligible to register?

A. Yes. We have no good statistics on the proportion of Armed Forces or dependents in Hawaii, as to whether they are locally eligible or not.

Mr. Tonaki: No further questions, Your Honor.
Judge Pence: Mr. Dodge?
Mr. Dodge: I have no questions.
Judge Pence: Any questions?
Mr. Kanbara: Yes, Your Honor.

[fol. 787] Cross examination.

By Mr. Kanbara:

Q. Mr. Schmitt, would it be proper to say that you do not have figures showing the persons eligible to register, but who are unregistered by Districts?

A. We have no such data, and it would be very difficult to make even an approximate estimate by District.

Mr. Kanbara: That's all.
Judge Pence: Mr. Padgett.

Cross examination.

By Mr. Padgett:

Q. Mr. Schmitt, do you have Exhibit 15 before you?
A. Which?

Q. Exhibit 15, "Military Personnel and Dependents in Hawaii"?

A. Yes, I have.

Q. Would you turn to Table 9?

A. Yes. I have it before me.

Judge Jertberg: Just a minute, until we get it.

Judge Beeks: What page is that Table 9?

Mr. Padgett: 13, Your Honor. 13 of Exhibit 15.

Judge Beeks: I have it.

By Mr. Padgett:

Q. Do I understand correctly, Mr. Schmitt, that those two columns are two estimates by two different United States Government Bureaus as to the number of military [fol. 788] members of the Armed Forces in the State of Hawaii?

A. Yes. As noted in footnotes 1 and 2, they were developed by different agencies on somewhat different definitions.

Q. Well, which one is the basis which you have used in the figures that you have just referred to in Exhibit 14?

A. Are you referring to the 1960 population by—

Q. Yes.

A. Neither one of these. That is, the 1960 data were from the 1960 census of population. The census estimate here is the annual series as of July 1, provided by the Bureau of the Census on the basis of information supplied by the Armed Forces. And the Office of Business Economics estimate is based on similar information, but excluding the men aboard ship.

Q. Do you have any idea whether the men aboard ship would be sufficient to account for these rather considerable discrepancies between those two sets of figures?

A. Well, partly it's a matter of men aboard ship; partly a matter of the dating. That is, in one case it's July 1; in the other case, it's supposedly an annual average of monthly

or quarterly data. However, there is a very perplexing discrepancy for 1962 that we have been unable to resolve in a great volume of correspondence.

Mr. Padgett: I have no further questions.

[fol. 789] Judge Pence: I think, Mr. Funaki, you said you had no questions?

Mr. Funaki: No, I have no questions.

Judge Pence: Do you have any questions?

Judge Beeks: No.

Judge Jertberg: No.

Judge Pence: I have just one, I think. I notice on Exhibit 15, page 9, for the years '42, '43, '44, and '45, a large number of military personnel. Are the facts available to you, Mr. Schmitt, to show how that personnel was located in the then Territory of Hawaii? For example, how many were on Maui; how many were on Hawaii;—during any one of those years—how many were on this Island?

The Witness: I don't know statistics giving the geographic distribution; simply the Territory-wide totals.

Judge Pence: Were you here during that period?

The Witness: No, I wasn't.

Judge Pence: I have no other questions. Thank you, Mr. Schmitt.

(The witness left the witness stand.)

Mr. Kanbara: Your Honor.

Judge Pence: Mr. Kanbara.

Mr. Kanbara: If the plaintiffs are through with Mr. Schmitt, we'd like to—we may have Mr. Schmitt for additional direct examination.

[fol. 790] Judge Pence: Do you want him now?

Mr. Kanbara: Yes, Your Honor.

Judge Pence: There being no objection—Mr. Schmitt, retrace your steps.

ROBERT SCHMITT, was recalled as a witness for Intervenor Plaintiffs, and testified as follows:

Direct examination.

By Mr. Kanbara:

Q. Mr. Schmitt, I show you Exhibit GO-3, which is a map of the 15th District—15th Representative District. Have you had occasion to make yourself familiar with the composition of the electorate within the 15th District?

A. Yes, I have.

Q. In what connection was this?

A. On several occasions, some years ago, I made a careful study of census statistics on this District at the request of the then delegate to Congress who was interested in it. And more recently, I had occasion to review the data from more recent samples and censuses.

Q. And this District has six Representatives in the House, does it not?

A. That's right.

Q. Could you indicate to the Court the various—what you might call "sub-districts" on the basis of the composi-[fol. 791] tion of the population, and the nature of the industry or business within each?

A. Yes. The 15th District consists of a number of very distinct neighborhoods of what the urban sociologists would call "natural ecological areas."

Judge Beeks: Just a moment.

Judge Pence: The suggestion has been made by Judge Beeks that as you identify those various distinct neighborhoods, that you write down exactly what they are as you're testifying so that when we look at the map, without necessarily referring to our notes, we will be able to follow—

Judge Beeks: Just draw a line out to the side. It will be easier than trying to take notes on this thing.

The Witness: All right. Perhaps it would be even easier if I simply listed the neighborhoods by the precincts that make up the neighborhoods.

For example, beginning at the makai—the seaward end of it, the lower end of the map, Precincts 11, 23, 24, and 12 are Waikiki, extending from—on the ocean side of the Ala Wai Canal over to Kapahulu Avenue.

Precinct 10 is part of Kapahulu neighborhood.

Precinct 7 would be—and I suppose 21—7 and 21 would be McCully District.

9 and 10—I'm sorry; 9 only—9 and 20 would be Moiliili. [fol. 792] There appears to be no number in this precinct which is bound—which is on the Kokohead side of 19, and on the Ewa side of 6. Do you happen to know the number?

By Mr. Kanbara:

Q. Why don't you describe it?

A. The unnumbered precinct here, which is bounded on the makai side by King Street and Waialae Avenue; on the Kokohead side by—looks like the Palolo drainage canal and Manoa Stream; on the mauka side by Dole Street, University Avenue, and Metcalf; on the Ewa side by Isenberg Street and Wilder; that, together with 18 and 19, would be Bingham Tract—once referred to as "Chinese Hollywood."

The 6th precinct—Precinct No. 6 is St. Louis Heights.

There is an unnumbered precinct which contains Mid-Pacific Institute and the University of Hawaii. That, together with 4, 16, 15, and 17, would be Manoa Valley.

2 would be regarded as Punahou District.

13 would be Makiki.

1, Makiki Heights and Tantalus, Round Top. I believe that covers all of the natural areas or the neighborhoods in the 15th District.

Q. Mr. Schmitt, could you tell the Court the characteristics of the—or, the composition of the electorate, grouping, where feasible, the sub-districts that you've mentioned. For example, take Waikiki. That is what you might call [fol. 793] a distinct neighborhood.

A. Yes. Waikiki, as most persons know, is the center of tourism in Hawaii. The census excludes, of course, the non-resident population of Waikiki, which, at the height of the

tourist season, now runs to well over 15,000. However, there are about 12-, 13,000 permanent residents there. But when we speak of "permanent," this is by census definition. The permanence of the Waikiki resident is considerably less than that, say, of the Manoa resident. He is a short-term resident. There is a predominance of women. The population excludes virtually no one under the age of 20.

Occupationally, it's rather a middle and perhaps upper-middle group, with a large admixture of Armed Forces families; and is a very distinct geographic area, from a demographic, sociological point of view.

McCully and Moiliili have some of the—have a largely middle class and somewhat lower than middle class population; a very large number of children. Occupationally, many persons in, oh, say, skilled or clerical occupations; some semi-skilled; perhaps a few unskilled.

This is also true of Kapahulu.

Q. That is primarily, from an ethnic point of view, Oriental?

A. Yes. McCully and—in fact, according to census statistics, there is a belt that stretches from, roughly, Pensa- [fol. 794] cola Avenue over as far as Kapahulu, and into Kaimuki, for that matter, running, oh, just on the—along King Street, between King and Kapiolani—between Beretania and Kapiolani Boulevard and Harding; along in there; which had the highest proportion, at the last census, of Japanese population on the Island of Oahu. Whereas, Waikiki has a largely Caucasian population. Manoa, largely Caucasian, but with a growing admixture of Chinese and some Japanese.

Q. Proceeding to—can you group, say, Kapahulu, Bingham Tract, St. Louis Heights, Manoa?

A. Those tend to be—well, Kapahulu is more or less comparable to McCully and Moiliili, but with, ethnically, more Hawaiians and fewer orientals. But Bingham Tract, lower Manoa, St. Louis Heights—at least the lower regions of St. Louis Heights—have rather large proportions, as these things go, of Chinese, a fair number of Japanese,

some Hawaiians, some Caucasians. They are predominantly middle class; somewhat, perhaps, a little above middle class, with an average number of children, and a rather balanced sex ratio—that is, males per hundred females.

Q. How about occupationally?

A. They are the higher proportion of professionals and semi-professionals, managerial, but not a very exceptionally large proportion.

Q. Is there a section you might call "The University [fol. 795] Community"?

A. Yes. Around central Manoa, chiefly, where there is a very high proportion of University faculty and employees; some students. A relatively low proportion of young persons, other than the students; and one of the lowest sex ratios on Oahu; that is, males per hundred females. It's one of the few places on Oahu where women out-number men.

Q. Are there any other districts remaining that you might consider to constitute a distinct neighborhood?

A. Makiki Heights, Tantalus, has many of the same characteristics as upper and central Manoa, except that the densities, of course, are much lower—population density. Fewer persons per acre.

Q. Turning now, Mr. Schmitt, to an entirely different subject. On the matter of—have you had any experience in constructing or drafting apportionment plans? Have you had occasion to?

A. Yes. Yes, I have. My staff and I, several months ago, did prepare a redistricting plan based on 51 Representatives and 25 Senators, and total population as of 1960, using census tracts as the units for grouping.

Q. Now, that's—

Judge Pence: How many Senators?

The Witness: 25. The existing number, in other words.

[fol. 796] By Mr. Kanbara:

Q. That's one from each district?

A. That's right.

Q. 25 Senators; one from each district?

A. This was a one-person, one-district basis.

Q. Now, as far as census tracts are concerned, what sort of boundaries or monuments did you follow?

A. The Census Tract System, which has been used on the Mainland since 1910 and in Hawaii since 1940, consists of statistical areas of relatively homogeneous social, demographic and economic characteristics, bounded by easily-observed permanent-type features such as highways, railroads, major ridges, streams of—that is, large streams, and other features that an enumerator can easily observe in the field, and which very markedly distinguish one area from another. They average in population from 3- to 5,000.

Q. Are there any sub-districts within a census tract?

A. The Bureau of the Census has—uses as an administrative unit the Enumeration District. The Enumeration District consists of the area covered by a single enumerator, which averages about 800 in population. It supposedly follows equally well-observed physical boundaries, but these boundaries need not have any great significance in differentiating natural areas. That is, they are purely for administrative convenience.

Q. Now, in creating Senatorial and Representative Dis- [fol. 797] tricts, is it feasible to follow census tract boundaries as a starting point?

A. Not only feasible, but quite feasible and desirable.

Q. In other words,—and in certain instances, I suppose, there might be a necessity for following enumeration district boundaries—

A. Where the census tract boundaries were insufficiently detailed—that is, where the tracts were too large or unmanageable due to population growth, for example; or because they covered a rather large geographic area, it might be desirable to follow the enumeration district boundaries.

Q. That can be done without too much difficulty?

A. Yes, although not as easily as the tract boundaries.

Q. In arriving at an equitable apportionment plan?

A. That's right.

Q. Now, how about using precinct boundaries to work up an apportionment plan?

A. The difficulty with the precinct boundaries is that, after considerable work with these boundaries, I have concluded that they, in many cases, are not easily identified in the field. They violate boundaries used for other purposes. That is, there is no uniformity or unanimity in their use. They are not as clear, statistically, as they might be; and [fol. 798] are sometimes—the rationale for establishing them in their particular location is not always clear.

Q. In other words, in allocating population, for example, to a precinct, I take it that the precinct boundary lines in most instances do not coincide with census tract boundaries or enumeration district boundaries, or—

A. They seem to coincide with nothing else at all.

Q. I see. Is there much difficulty in estimating the population within a precinct?

A. For some precincts, no. For many, a great deal of difficulty. In fact, using the statistics—the 1960 census—even where available on a block basis, as they are for Honolulu and Hilo cities, there are many precincts which, because they go right down the middle of large blocks,—and Hawaii does have some large blocks because of its peculiar topography—it's impossible to make an accurate determination of the population of a given precinct.

Mr. Kanbara: I have no further questions.

Judge Pense: Mr. Dodge.

Cross examination.

By Mr. Dodge:

Q. Mr. Schmitt, you wouldn't have the difficulty—or, you don't run into the same difficulty, do you, when you determine your registered voter population within a precinct?

A. No, because voters are registered on a precinct basis.

[fol. 799] Mr. Dodge: No further questions.

Judge Pence: Mr. Padgett.

Cross examination.

By Mr. Padgett:

Q. Mr. Schmitt, have you seen the exhibit which was put in this morning, Exhibit 17? This is the one showing the Representative Districts and Senatorial Districts on the military reservations?

A. Yes. I have seen this map.

Q. I take it, from looking at that map, that there are areas on this Island, military reservations with a very heavy population?

A. There are, indeed.

Q. And that in such places, there may be almost no registered voters?

A. The number of—the percentage of registered voters would be quite low in some of these areas.

Q. It would be, if you were going on a single-member Representative District basis, reapportioning the State on that? It would be possible, would it not, for example, in the Hickam-Pearl Harbor area, to construct a Representative District which would have almost no voters?

A. That would be possible.

Mr. Padgett: I have no further questions.

[fol. 800] Judge Pence: Mr. Funaki.

Mr. Funaki: I have no questions.

Judge Pence: Any redirect?

Mr. Kanbara: No further questions.

Judge Pence: Any other questions of Mr. Schmitt?

Is Mr. Schmitt going to be called by any other attorney?

Thank you, Mr. Schmitt.

* * * * * * *

[fol. 801] EILEEN K. LOTA, a witness called in behalf of the Defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. Dodge:

Q. Will you state your name, please?
A. Eileen K. Lota.
Q. And—

Judge Pence: One moment. The last name is spelled—
The Witness: L-o-t-a.

By Mr. Dodge (Continued):

Q. And what is your position, Mrs. Lota?
A. City Clerk for the City and County of Honolulu.

Judge Pence: Since recently.

By Mr. Dodge:

Q. How long have you had that position?
[fol. 802] A. January 2nd, 1965.
Q. Prior to that, were you in the—an officer of the Clerk's Office?
A. Yes. I was Deputy City Clerk for four years.
Q. Now, it is true, is it not, that the City Clerk—or, the City and County Clerk is a corresponding position to the County Clerks in the other Islands?
A. Yes, sir.
Q. And the County Clerks each have the responsibility for the administration of the election laws?
A. That's true.
Q. Particularly, the registration of voters?
A. Yes.
Q. What is the necessary qualification for a person to qualify to vote in Hawaii?
A. That he be a citizen of the United States by birth or naturalization; be 20 years of age on or before the day of election; be able to speak, read, and write the English or Hawaiian language; be a resident of the State for at least

one year, and three months in the particular Representative District where he resides;—

Judge Beeks: In addition to the one year, or part of it?

The Witness: Part of the one year. And if convicted [fol. 803] of a felony, be pardoned by the Governor.

Q. Our law provides that a person convicted of a felony has his voting rights taken away, and he must be pardoned in order to get them back?

A. That's true.

Q. Are you familiar with the procedures of the Clerk's Office, City and County of Honolulu, for registering voters?

A. Yes, I am.

Q. Would you describe briefly what that procedure is, as far as your own staff is concerned?

A. Any person qualified to and desiring to register may present himself at any time during business hours at the office of the City and County Clerk, then and there to be examined under oath as to his qualifications as an elector. Each applicant shall make and subscribe to an application in a form that I have with me.

Mr. Dodge: We will, I think— May it please the Court. I will offer these forms for the various Counties in evidence later.

A. (Continued) That about does it.

Q. Yes. In other words, your office is open how long? Over a period of a year. For how many days is it open for the registration of voters?

A. The registration is open—well, first of all, it is closed [fol. 804] 30 days before the primary election, and 10 days before the general election. Other than that, it is open all throughout the year for registration.

Q. Now, that is as far as your own staff in the Clerk's Office is concerned?

A. That's true.

Q. Now, is there a different procedure, or are there additional registrars at about election time?

A. Yes, Mr. Dodge. We have a number of volunteer registrars during an election time, in addition to our staff. As of June 1st of 1964, we had 200 volunteers that were placed throughout the Island of Oahu to make it convenient for the electors to register.

Q. Were they deputized so that they had authority to register voters?

A. Yes. Yes, they were.

Q. And how are they—how do you get these volunteers?

A. We had 75 volunteers from the Republican Party; 75 from the Democratic Party; we had 3 from the Koolauloa JC's; the Unions participated—8 from Unity House; UPW had 5; AFofL-CIO, 19; and the ILWU, 10.

Q. And is it your testimony that these volunteers work outside of the City Clerk's Office?

A. Yes, they do.

[fol. 805] Q. Where would I find a registrar? I mean, somebody who could register me, from one of these volunteers?

A. We had them located at various points throughout the Island of Oahu. And I would like to offer this for you, Mr. Dodge. (Indicating.)

Q. Is the location and the hours when somebody can register—is that made generally known throughout the community?

A. Yes, it is. Besides having this little bit of information that we distributed, we also had this printed in the daily newspapers.

Q. By public advertisements?

A. Yes.

Q. Showing you this "Registration Points of Oahu," who prepared that?

A. This was prepared by the Democratic Party of Hawaii.

Q. And was it generally circulated—

A. Yes, it was.

Q. —to your knowledge, throughout the community?

A. Yes, it was.

Mr. Dodge: I offer in evidence a folder entitled, "Registration Points on Oahu" as an exhibit for the defendant.

Judge Pence: What's the number, please?

The Clerk: Defendant's Exhibit B, Your Honor.

[fol. 806] Judge Pence: Defendant's Exhibit B. Any objection? There being none, the same is admitted as Defendant's Exhibit B.

(The document referred to was admitted in evidence as Defendant's Exhibit B.)

By Mr. Dodge:

Q. Now, did you have a stock of these forms, Defendant's Exhibit B, in your office for distribution?

A. Yes, we did, Mr. Dodge.

Q. And you also stated, I think, that in addition to this folder, there were public advertisements presenting the same or similar information to the voters?

A. The same information.

Q. And these were in the public newspapers?

A. That's right.

Q. And for how long a period prior to an election would you say that these deputy registrars are throughout the Island?

A. From about the 1st of June.

Q. Until the election, which is October and November?

A. Until October and November, yes.

Q. Now, Exhibit B here indicates that these are at fixed places throughout the Island, particular stores or locations?

A. Yes.

[fol. 807] Q. Is there any effort made by any of these deputy registrars to go and search out voters?

A. Yes. I must say that we are grateful for the volunteers from the Democratic Party because they went on a complete house-to-house canvassing, offering their services to register voters.

Q. And the same was true of other volunteer workers?

A. Yes; of all other volunteers.

Q. Is there any procedure set up for registering somebody who is not registered, but qualified; and yet is absent from Oahu?

A. Under Section 11-9 of our statutory laws, there is a form that we have, "Absentee Registration Procedures." This is used primarily by students who are at some learning institution on the Mainland, or military personnel. And we mail the forms to them; and they need, of course, to have three supporting affidavits attached to the forms, and presented back to our office. The forms have to be notarized.

Q. Now, does the procedure for registering qualified voters on Oahu include a procedure for registering those who may be in military service?

A. Yes. We have.

Q. And would you—is that procedure essentially the same for registering civilians?

A. The procedure, or the guidelines to registration of [fol. 808] military personnel is one whereby the military person must reside off of the military post or reservation for a period of one year, and in the Representative District for three months; and this is applicable to the same that we ask of any others that come in to register.

No. 2, he must indicate, on service or organization records, that Hawaii is his permanent domicile. The date when this indication is made counts toward the one-year resident requirement. Thus, if he makes his indication today, the period of fulfillment of the resident requirement starts from this date on.

At the time of applying for registration, he must produce a document or letter certifying (a) that his records indicate Hawaii as the permanent domicile, and date of this indication; (b) that he is permitted to live off base, and has lived off base at such an address for a period of time. And the dates, of course, we would like to have.

The above statements must be signed and certified by the Officer in Charge.

Q. Now, is it possible for a person in military service, or his adult dependents, to register with the deputy registrar in the outlying areas, if he has this information?

A. Because of the amount of controversy that went on in this past registration with regard to military, Mr. Hanapi, who was then the City Clerk, advised all of the [fol. 809] volunteer deputies that he would rather that the particular individual from the military come to our office to register, so that in the event there was any questions—any documents that were needed, we would try to take care of it right at the office.

Q. Now, does the City Clerk's Office ever have occasion to call upon a person not in military service for additional evidence of his qualifications as a voter?

A. Yes. There have been a few cases where the City Clerk has used his discretion on asking for additional information with regard to a registration of a particular elector.

Q. In general, would you say that the City and County of Honolulu makes every effort to encourage persons to register during elections?

A. Yes, I do. I'm very proud of the operation that we have had in the City Clerk's Office for these past four years that I have been there; and I assure you that every effort has been made to see that we can actually help the elector to become registered.

Q. Now, are you familiar, Mrs. Lota, with the registration procedures used by the Clerks of the neighboring Counties?

A. Yes, I am. And for the information of the Court, I took it upon myself to contact each of our neighbor island Clerks, and I've asked them to supply information with [fol. 810] regard to the procedure of voting on their particular island.

Q. You obtained from them the forms that they use, and a brief summary of their registration procedure?

A. That's right.

Q. Now, on these neighbor island counties, would you say that basically the same practice is followed by them? In other words, do they deputize volunteers during periods before elections?

A. Yes, they do.

Q. On the Island of Hawaii, for example—or the County of Hawaii—how many deputies do they have?

A. On the Island of Hawaii, Mrs. Kaawa, who is the County Clerk there, deputized 15 volunteers during the election. 50, excuse me. There were 50.

Q. 50. And how many on Maui?

A. On Maui, there were 100.

Q. And on Kauai?

A. 33.

Q. And these, as in the case of the City and County of Honolulu, were all in addition to the regular staff?

A. To their regular staff.

Mr. Dodge: If there is no objection, I would like to have a summary of the election registration procedures as shown by documents received from the County Clerk at Kauai, the County Clerk in Hawaii, and the County Clerk of Maui, [fol. 811] and the City and County Clerk of the City and County of Honolulu, together with the applicable registration forms that were used, offered in evidence.

Judge Pence: Do you want them as one, or separate?

Mr. Dodge: I think one would be sufficient, Your Honor.

Judge Pence: That would be Defendant's Exhibit C. Any objection? There being none, Defendant's Exhibit C is admitted in evidence.

(The documents referred to were received in evidence as Defendant's Exhibit C.)

By Mr. Dodge:

Q. One further question, Mrs. Lota. Does the office staff of the City Clerk's Office stay open more than the usual business hours?

A. Yes.

Q. Just prior to election?

A. Just prior to election.

Q. And what would that be?

A. Well, on the last night of registration, the office is open until midnight, preparing for the closing of the primary. And the same with the general.

Mr. Dodge: I have no further questions.

* * * * * * *

[fol. 812] Judge Beeks: So that notwithstanding the Con-
[fol. 813] stitutional provision in Hawaii, a person in the Armed Services may gain residence for the purpose of becoming an elector if he's lived here a year and has indicated his intention of—

The Witness: That's right.

Judge Pence: And lives off of the military base.

The Witness: And lives off of the military base.

Judge Pence: Or off of one of the military housings.

The Witness: Yes.

Judge Pence: Mr. Dodge, was there not—at the time of the many cases that were filed in late 1964, just prior to the election, filed by those in the military service—was there not a concerted effort made to determine how many who thought themselves eligible should apply, should register for determination? Wasn't there—as I recall it, wasn't there some sort of a move made at that time last year to give everyone who felt that they were eligible, no matter whether they lived off or on, to attempt to register?

Mr. Dodge: I'm sure that Mrs. Lota is familiar with the procedures that were undertaken; sort of a conditional registration, which I am sure she can explain.

Judge Pence: Well, let's have that, will you please, Mr. Dodge, and see what results came from it?

By Mr. Dodge:

Q. Following the preliminary determination, I believe,
[fol. 814] by one of the Federal Judges prior to the 1964 election, was there an effort made to see how many military persons were qualified to vote?

A. Yes.

Q. Will you explain what procedures you used?

Judge Pence: Excuse me. That was without reference to whether they lived on or off the base?

The Witness: Yes, that's true, Judge.

Judge Pence: Proceed.

A. This was two days before the closing of the registration for the general election, and volunteers went to the various military reservations to offer their services, to register people who desired to. We received 1,000 applications; and out of these 1,000, 300 were qualified. So then—

Judge Pence: Excuse me. When you use the term "qualified," you mean that 300 were qualified in every way except that they lived on the base, is that it?

The Witness: These 300 were qualified because they lived off of the military base. They were either—they were born here in Hawaii, a number of them; and their wives, also, following their domicile, were eligible. And they were those that were qualified because they came forth with the proper documents showing that their records indicated Hawaii to be their domicile.

By Mr. Dodge:

Q. One other question, Mrs. Lota. Prior to this two days [fol. 815] of effort—and not only volunteers took these, but weren't they doing the same registration at your office?

A. Yes.

Q. Now, prior to that 2-day period, was there publicity on what was required for a person in the military service to register?

A. Yes, there was. Yes, there was. And Mr. Sato, who is in charge of our Election Division, he took a great interest in this, and was in constant contact with the leaders of the military branches, offering his services in answering any questions that might come about with regard to who would be qualified. He got together with a number of them.

He made, even, forms available so that these people would be able to fill them out without too much problem.

Q. I don't know whether you have this figure, but you do not mean to indicate that 300 is all—is the total number of military—

A. No. The 300 I'm speaking of, Mr. Dodge, this was processed, and they were qualified within that last period of two days. Prior to that, there were a number that Mr. Sato, in our Election Division, processed. I don't have the figures now, however.

Q. But you have always registered military personnel who could show their qualifications to be voters?

[fol. 816] A. That's right. Definitely.

Judge Jertberg: The election with this publicity campaign which you mentioned, was it publicly announced that the adult dependents who lived off the base—of a serviceman who lived on the base—were not eligible?

The Witness: The publicity campaign actually just merely set the guidelines as I read them off. And it was the indication of Mr. Hanapi—he gave the release on this—that these people come into the office to actually get processed.

Judge Jertberg: What is the position of an adult dependent of a serviceman, other than the wife, who lives on the base but her supporter, so to speak, is on the base? In other words, take the case of a serviceman on the base who has a daughter 25 years old who is dependent upon him but who lives with her mother, we'll say, off the base. Is my question clear?

The Witness: It would be my presumption if she were an independent at 25 years of age, and has established Hawaii her own self as her domicile, would be eligible to vote.

Judge Jertberg: Just take the situation of a girl 25, who lives at home with her mother, off the base, entirely dependent for support on her father, who is stationed on a reservation. She comes in to vote—or, to register. Is

she permitted to register, or is she disqualified because her [fol. 817] father lives on the base?

The Witness: As long as she can show us that she is living off of the military base, has been a resident of Hawaii for one year, has lived in a Representative district for three months, and is of voting age, she would qualify to register.

Judge Jertberg: But her mother would not?

The Witness: Her mother would still have to follow the domicile of her husband.

* * * * * * *

[fol. 818] ROBERT SCHMITT, a witness recalled on behalf of the plaintiffs, resumed the witness stand, and testified as follows:

Direct examination.

By Mr. Tonaki:

Q. Mr. Schmitt, do you have data concerning the economic characteristics of military families in the State of Hawaii?

A. Yes, I have.

Q. What are your sources of information?

A. Well, first of all, publications of the Honolulu Redevelopment Agency, titled, "Redevelopment and Housing Research," for July 1963 and July 1964; the Department of Education, a report on the statistics of pupil membership and personnel, 1962-1963, the most recent one available; and the Department of Planning and Economic Development statistical report 20, dated July 27, 1964, in- [fol. 819] cluding an errata sheet dated November 6, 1964; the U. S. Census of Housing for 1960, Final Report HC(1-13), published by the Government Printing Office in 1961; the Annual Report of the Department of Health of the State of Hawaii for 1963, Statistical Supplement; information obtained from the Bank of Hawaii, which main-

tains statistics on military payroll, obtained from the Armed Forces; information from the Office of Business Economics' survey of current business for August, 1964; information obtained from the Department of Defense by the Department of Planning and Economic Development; and recently-released information from the 1963 Census of Business, Report BC-63 (A-R 13); and finally, some information from the Honolulu Police Department, 1960 Statistical Report.

Q. Did you participate in any of these surveys?

A. Yes. The Redevelopment Agency reports which I say here extensively were based on information supplied by me. I personally compiled from the Armed Forces a number of these estimates on military housing and characteristics of military households, the number of military personnel and dependents; and I am well acquainted with the way in which the other series were developed.

Q. How many military households are there in the State of Hawaii?

A. At the time of the most recent survey, October 1962, which covered the Island of Oahu, there were 23,900 house-[fol. 820] holds headed by a member of the Armed Forces, or 18.5 percent of the total number of households on this Island.

Judge Jertberg: What was that last figure?

The Witness: 18.5.

By Mr. Tonaki:

Q. Will you describe the characteristics of these military households, describing their spending habits, the attendance of their children in school, et cetera?

A. The average household size of the Armed Forces households was 3.99, slightly smaller than those of civilian households. 71½ percent of these military households have lived here longer than one year, and 11.4 percent have lived here longer than five years. Their median family income

was $4,777.00. 6.7 percent lived in their own homes; that is, they were owner-occupants.

Judge Pence: How many?

The Witness: 6.7. For civilians, it's 54.4. 32 percent of the military households were occupants of private rental housing. 14.8 percent of all private rental units were occupied by military households.

Judge Beeks: What was the last figure again?

The Witness: 14.8.

Judge Beeks: What was that?

The Witness: That is the private rental units on Oahu; 14.8 percent were occupied by military households.

[fol. 821] Judge Beeks: Of the total units?

The Witness: Of total private rental units. 56.6 percent of the military households lived in housing supplied by the Armed Forces; that is, on-base housing.

In April 1964, out of 192,580 housing units in the State of Hawaii, the number provided by the Armed Forces numbered 13,397, or 7.0 percent of the total. That included Wherry Act, Capehart Act, and other on-base housing.

In October 1962, the most recent year for which the statistics have been published,—I believe they've been compiled since then, however—the number of military children attending public schools was 23,026. That was 15.0 percent of all children attending public school.

Judge Pence: What percentage, again, please?

The Witness: 15.0. Roughly, one out of seven children in public school in October 1962 was a service child.

The number of military personnel and dependents on the most recent date, as you note from the report entered as evidence this morning, was 128,930. The number of military families—

Judge Pence: What does that 128,930 represent?

The Witness: That was members of the Armed Forces and their dependents domiciled in Hawaii. The number of military families—a family being defined somewhat differently from a household—was 21,631 as of July 1, 1964.

[fol. 822] On April 1, 1960, the census date, the number of persons living on military bases—this included both military and their dependents, and perhaps some civilian employees of the Armed Forces— the number of persons on base was 71,672 living in 13,238 housing units, plus a fairly large number living in barracks.

The Armed Forces accounted for 2.0 percent of all deaths occurring in the State. This was just to Armed Forces alone, not to their dependents.

Men in the Armed Forces fathered 28.2 percent of the children for which the father was known.

The members of the Armed Forces accounted for 24.9 percent of the marriages, and 15.9 percent of the divorces. These vital statistics are for 1963.

The payroll for members of the Armed Forces stationed in Hawaii was $149,000,000.00 in 1963, or 12.0 percent of the total wage and salary disbursements for the State.

Judge Pence: May I have that last figure?

The Witness: 12.0.

Judge Beeks: What was the amount?

The Witness: $149,000,000.00.

Judge Beeks: I didn't get that.

The Witness: $149,000,000.00. Post Exchanges, commissaries, and eating and drinking places operated by the Armed Forces had total retail sales of $84,693,000.00, or [fol. 823] 10.1 percent of all retail sales in the State.

177 Part 1 offenses cleared by arrest were members of the Armed Forces, and 1,049 Part 2 offenses, excluding traffic. This means that adult offenders—members of the armed forces—constituted 14.7 percent of Part 1 offenders and 10.0 percent of Part 2 offenders, of the total adult offenders apprehended.

That pretty well covers the available information on the economic and social impact of the Armed Forces in Hawaii.

Mr. Tonaki: No further questions.

Judge Pence: Mr. Kanbara, any questions?

Mr. Kanbara: No questions, Your Honor.

Judge Pence: Mr. Dodge?

Mr. Dodge: No questions.

Judge Pence: Mr. Padgett?

Mr. Padgett: No questions, Your Honor.

Judge Pence: Mr. Funaki?

Mr. Funaki: No questions, Your Honor.

Judge Beeks: The 10.1 percent of all retail sales, those are on strictly military stores, on military bases?

The Witness: That's right. Post Exchanges, commissaries, and eating and drinking places operated by the Armed Forces.

[fol. 824] Judge Beeks: But employing some civilian employees from the populace generally, I suppose?

The Witness: I assume they would.

Judge Pence: What, if you know, is the tax situation insofar as State income tax applying or not applying to military personnel, if you know?

The Witness: I'm not sure of the exact requirements on that.

Judge Pence: Do you know anything about the gross—excise taxes, that is—gross income taxes?

The Witness: Certainly any purchases made by a serviceman in the civilian community, he would pay the 3½ percent excise tax.

Judge Pence: How about the different side of the same coin; namely, the sales in the PX—in the exchanges, and so on?

The Witness: I believe those are exempt, but I'm not sure.

Judge Pence: Don't look at me. I was just asking a question.

I have no other questions. Any questions from any counsel?

Thank you very much, Mr. Schmitt.

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[fol. 825]

Excerpts From Transcript of Proceedings— April 15 and 16, 1965

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INQUIRY BY JUDGE PENCE AND RESPONSE OF MR. KANBARA

Judge Pence: The Court has determined that in order that this may move along with the greatest speed and justice, that those parties, those attorneys who represent parties in favor of the plan of the Legislature as submitted, will identify themselves, and those who are opposed to the plan will likewise identify themselves. And then we will permit the proponents to state their position and the reasons for the same. Beginning at the left over there with Mr. Tonaki, what is the position, if you care to state it, for yourself and your clients?

* * * * * * *

[fol. 826] Mr. Kanbara: Representing the Governor, we would oppose the plan.

* * * * * * *

[fol. 827] OFFERS IN EVIDENCE

Judge Pence: Excuse me, Mr. Kimura, do any of the Counsel here have any objection to that card entitled "Proposed Senatorial Districts" being introduced in and received in evidence?

Mr. Dodge: No, I have no objection.

Judge Pence: Any objection? There being none, it will be marked as—

Mr. Kimura: They were all pre-marked, your Honor.

Judge Pence: —as Senate Exhibit 8. The same is received in evidence.

(The chart referred to was received in evidence as Senate Exhibit 8.)

Judge Pence: Proceed. Continue with Senate Exhibit 8.

Mr. Kimura: Yes, your Honor. The number of Senators allocated to each of these districts listed under the heading of "Number of Senators," the 1st having 3; the 2nd, 2; [fol. 828] the 3rd, 3; the 4th, 4; and 4 here, and with Kauai, the 8th Senatorial District, having 1; totaling 25. This number 25 is retained in the present number under our State Constitution.

The registered voters, 1964 registered voters, as we have it, are listed and are in line with the district allocations, totaling 239,361.

We shall subsequently, your Honor, establish these figures as being the authentic figures for 1960 for the registered voters by witnesses whom we will put on the stand.

This, in essence, are the proposed senatorial districts incorporated, and the provisional plan as well as the plan calling for the constitutional amendment. We will establish through our witnesses to show that the districting—

Judge Pence: You are now referring to what?

Mr. Kimura: Yes, your Honor, referring to Exhibit S-5 marked for identification.

Judge Pence: Is there any objection to the introduction of Exhibit 5 into evidence at this time?

Mr. Dodge: No, your Honor.

Judge Pence: There being none, Senate Exhibit 5 may be received in evidence.

(The chart referred to was received in evidence as Senate Exhibit No. 5.)

Judge Pence: The same being a map, purporting to [fol. 829] be a map of—

Mr. Kimura: The Island of Oahu.

Judge Pence: The entire island?

Mr. Kimura: This is the entire Island of Oahu.

Judge Pence: And is this 5 that you are pointing to?

Mr. Kimura: This is 6, your Honor.

Judge Pence: 5 is the windward, the leeward side?

Mr. Kimura: No, your Honor. This is downtown Honolulu.

Judge Pence: Downtown Honolulu?

Mr. Kimura: Yes, your Honor.

Judge Pence: And it will be the 4th, 5th, 6th and 7th?

Mr. Kimura: 4th, 5th, 6th and 7th Senatorial Districts.

Judge Pence: All right. It is received in evidence. Now, the next little map.

Mr. Kimura: The next map showing the plan of Oahu, marked as Exhibit 6, your Honor.

Judge Pence: Any objection to the admission of Exhibit 6, Senate Exhibit 6, into evidence, the same being a map of the Island of Oahu?

Mr. Dodge: No objection.

Judge Pence: There being no objection, the same is [fol. 830] received in evidence.

(The map referred to was received in evidence as Senate Exhibit No. 6.)

Mr. Kimura: And this exhibit here, showing the Island of Hawaii, is marked as 7. I would like to have that introduced in evidence.

Judge Pence: Any objection? There being none, Senate Exhibit No. 7, purporting to be a map of the Island of Hawaii, is received in evidence.

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Sakae Takahashi, a witness called by the Intervenor-Plaintiffs, being duly sworn, testified as follows:

[fol. 831] Direct examination.

By Mr. Kimura:

Q. Will you state your name, please?

A. Sakae Takahashi.

Q. And, Senator Takahashi, you are a member of the State Legislature?

A. That is correct.

Q. And you are a State Senator from the present 5th Senatorial District, are you not?

A. Yes.

Q. And what position do you hold in the State Senate?

A. I am Vice President of the Senate and Chairman of the Senate Judiciary Committee.

Q. And you are also, are you not, the Chairman of the Conference Committee?

A. Yes.

Q. In which the bills which are pertinent in this case came up for consideration?

A. Yes.

Q. Now, as Chairman of the Judiciary Committee and Chairman of the Senate Conference Committee, you are familiar, are you not, with House Bill No. 987, Senate Draft 1, Conference Draft 1, and House Bill No. 773, Senate Draft 1, Conference Draft 1?

A. Yes.

• • • • • • •

[fol. 832] Mr. Kimura: Will you proceed?

The Witness: Will you repeat the question?

Mr. Kimura: Yes.

By Mr. Kimura:

Q. The question is, will you state to the Court the background with respect to this problem, the problem faced by the Legislature, and the problems that were encountered in the working out of the plan and your reasons in coming out with it at this particular time?

A. Well, with respect to the background, I think that the Legislature has been confronted with this particular problem ever since the decision of the Supreme Court in June of last year. I am sure that this Court is well aware of the fact that there was a special session called and—

Judge Pence: We are familiar with the background. Just take up what the problems were, to which Counsel has directed your attention, in connection with these specific bills in the—let's call it the latest go around.

The Witness: Yes, your Honor.

A. (Continuing) The Senate and the House Conferees were appointed by the respective Speaker and President of the Senate, and the conferees who were also called the managers part of the House and part of the Senate, met, and the first thing we did was to appoint someone to act as Chairman. I happened to be the one delegated the job [fol. 833] of Chairman of the Conference Committee. And the first question which was posed to the members of the Conference was, what are we going to do with the advisory memorandum of Judge Beeks, joined in by Judge Jertberg and Judge Pence?

We deliberated on that particular problem for some time and came to the conclusion—we took your memorandum very seriously, Judge, realizing that, although it was an advisory opinion—

Judge Pence: A memorandum, not an opinion.

A. (Continuing) —a memorandum, and I think all of the members of the Committee respected this advice of the Court—however, the Committee came to the decision that this is not the kind of reapportionment plan we would want. First of all,—

Judge Pence: When you use the term "we," just whom are you talking about?

The Witness: Well, I think I talk for every member of the Conference Committee from the House and Senate.

Judge Pence: Do I understand when you use the term "we," you are purely subjective? In other words, what was going to be good and what we want, meaning you, the members of the Conference Committee, and purely subjective?

The Witness: Yes.

Judge Pence: That is the real justification—

The Witness: However, being interested in self-preser- [fol. 834] vation, I think that the members of the Conference Committee, many of them, were there to do a good job. They were determined to come out with a fair, reasonably equitable reapportionment plan. Many of them, I think, realized that they were going to vote themselves

out of existence. There were conferees on the Committee who were from neighbor islands, considering these factors.

Judge Pence: One moment. Which member of the Conference Committee from the Senate would, under the plan submitted, be voting himself out of existence?

The Witness: Well, I would say that on the Island of Hawaii, Senator Ushijima possibly might be voting himself out of existence.

Judge Pence: Now, if you had said Senator Yates or Senator Kinney had been on there and had willingly dropped one Senator from West Hawaii, I would observe that there would be more foundation of fact to your conclusion, to your conclusionary statement.

The Witness: I stand corrected. I don't think that any man's position is safe, especially coming from a district where the number 7 at the present time would be reduced to 3. You would stand a chance of losing your seat.

Judge Pence: Well, I understand from the first and second go-around that it was understood that the Island of Hawaii would lose 4. That was automatic.

[fol. 835] The Witness: Yes.

Judge Pence: As soon as we declared the Senate unconstitutional. Proceed, though.

The Witness: I might say, if the Court please, that one of the reasons for the Conference Committee to vote against the plan calling for single member districts, was the fact that the Senate here, as well as in the United States, in the States of the Union, has traditionally been a body made up of people from larger districts.

Judge Beeks: I take it from your testimony, Senator, and from the report which has been submitted, that you basically feel that where you are going to have the smaller single member districts that are closer to the people, it ought to be in the House of the Legislature that is more responsible to the people by having a shorter term. In other words, the House against the Senate.

The Witness: This is the position that we took, at least the members of the Senate Conferees took, and there was no objection raised by the House Conferees.

Judge Pence: Were there any suggestions that perhaps the proposed constitutional amendment should provide for a complete redistricting of the House to make the House single member district? Was that ever discussed?

The Witness: That was never discussed.

Judge Pence: So the representative area of those mem-
[fol. 836] bers of the House in the Conference Committee was not in danger?

The Witness: No.

Judge Pence: You answered that question. They made no objection?

The Witness: No.

Judge Pence: But you mentioned just a moment ago about one of the facts that led you to the ultimate plan here was that the United States Senate is made up of the idea of representing larger districts.

The Witness: No, your Honor.

Judge Pence: What I had in mind was, that there are only two United States Senators from every State.

The Witness: I did not make reference to the United States Senate, your Honor. I made reference to the Senates of the various States, or the upper house of the various State legislatures.

Judge Pence: Proceed.

The Witness: Then we proceeded on the basis of whether we should try to establish a two-member district plan. And for the same reasons, including one other reason which I did not mention earlier, the fact that smaller districts would tend to establish what one described as peanut politics.

Judge Pence: Then by that, coming back again, you would say that the United States Senators, because they
[fol. 837] have only two in a State, spread completely across the United States, are more prone to go into peanut politics?

The Witness: No, sir.

Judge Pence: Wherein lies the difference? Tell me.

The Witness: The United States Senator today represents the entire State.

Judge Pence: Well, is there anything wrong with that?

The Witness: There is nothing wrong with that, your Honor.

Judge Pence: Proceed.

The Witness: What I am trying to say is that if a Senator represents a small district, he would tend to be very localized in his thinking. And that is what I meant when I referred to peanut politics.

Judge Beeks: Well, on the other hand, when you take a situation like your 6th Senatorial District, made up of quite a number of representative districts,—I think on 1, 2, 3, 4, 5, 6, 7, 8—that one and the 15th having 31,000 population against 1,679, the highest population in any of them, you end up with a sort of reverse peanut political situation, don't you, where they are all going to come from that one district and the others are going to get very little representation?

[fol. 838] The Witness: I don't disagree with the Court. Personally, I believe that the 15th District is too large a district for a representative district, at this point. But I think the larger Oahu districts—it is my feeling, not the feeling of the Conference Committee—the larger districts ought to be broken up.

Judge Jertberg: To what extent is the thinking, at least of the Senate Conferees, influenced by the fact that there were multiple representatives in the lower House?

The Witness: I can't answer that, your Honor, because that problem was never discussed. The only position that we took is that there was nothing wrong with having multimember districts in the Senate and multimember districts in the House.

Judge Jertberg: Was this a general feeling, that a Senator should represent a larger district, at least a district of more population than a member of the lower House?

The Witness: That's right. That was the prevailing feeling in the conference. I don't believe anybody objected to that type of thinking. It was very thoroughly discussed. That is what happened at the conference. Then we went

into the so-called three-member district plans and the four-member district plans. And that evening we called it quits. Before we quit, we agreed that the Senate and the House will bring forth to the next meeting of the conferees pro- [fol. 839] posals for the establishment of three-member districts and four-member districts, and at the next meeting these proposals were submitted. In fact, the 5-member district plan was also discussed but after some objection from some of the Senators the five-member district plan was totally dropped, the objection being that having five Senators in one district out of a total of twenty-five makes up 20 percent of the composition of the Senate, and we felt that the Senate composition is too high. So we came back to a discussion of the 3-member district plan and 4-member district plan.

At one point the argument was raised that on the Island of Oahu especially, if we follow traditional lines or well-established geographic lines, the representative districts and the senatorial districts would be bounded by the same boundaries. We were specifically referring to the 15th Representative District and the 8th Representative District. And we felt that this kind of a plan is objectionable because having Senators and Representatives come out of the same geographic area bounded by the same boundaries would not be right. We thought we should go one step higher and go into the 4-member district category, where we reached a combination where there will be only one district on Oahu with overlapping boundaries. And this happened to be the 8th Representative District. And it is logical in my thinking and I think in the thinking of the members of the Committee that the 8th Representative District be one district [fol. 840] because they are bounded by this Koolau Range.

By Mr. Kimura:

Q. If I may interrupt one moment, by the 8th Representative District on the Island of Oahu, you are referring to the so-called windward side of Oahu, as shown on Exhibit

6, as set off by this red line following the ridge line of the Koolau Range, is that correct?

A. That's correct.

Q. This is the 3rd Senatorial District having a total population of 27,073 registered voters in a location of 3 Senators?

A. That's right. And this is all on one side of the Koolau Range on the other side of the island. We felt that there was ample justification to keep that particular district separate and, although the boundaries of the representative districts are the same, it would be the senatorial district and there was ample justification to keep it simply that way.

Then we agreed to combine the 8th and 9th—excuse me—the 9th and 10th Districts, the 11th, 12th and 13th and a portion of the 14th Districts, a portion of the 15th District, a portion of the 14th District and 15th Districts and 16th and 17th Districts. Every one of these districts would have four Senators except the 8th or the 3rd Senatorial District, which is on the other side of the island.

Then we went about getting figures to see whether the [fol. 841] figures come out as equal as possible. We were striving to reach an average of 38,000 voters per district, 38,000 voters per district, 4-member districts.

This is the result of our efforts. I know there are some objections and there were some objections after the plan was adopted because we did do some shifting of precincts. But the shifting followed a logical pattern. We shifted, for instance, the 1st and 8th Precincts. We shifted the 1st and 8th Precincts of the 11th District and combined it with the rest of the 10th Representative District.

Q. In other words, this line as shown on Exhibit 5, as I pointed down along this red line, has the boundaries between the 4th and 5th Senatorial Districts, and then the proposed 4th Senatorial District has two precincts of the 11th Representative District, to wit, the 1st and the 8th Precincts of the 11th Representative District?

A. That's right. I might add there, that we found it to be logical to transfer these two precincts to the 4th Sena-

torial District because the areas involved are characteristic of the entire 10th District, 10th Representative District. It is not in a solidly urban area. It is separated by a very marked Middle Street, which is a very distinct line of separation. And it just happens that the figures, we feel, are right in accord with what we were trying to accomplish.

I might add that the 4th Senatorial District is one of the [fol. 842] fastest-growing areas in Honolulu today. I think there are more subdivisions registered in that area than any other particular district on the Island of Oahu.

We did also divide the 14th District into two parts, the northern part of the divided 14th District is joined with the 12th, 13th and 11th, a part of the 11th, to make up the 5th Senatorial District. Here again the line of demarcation follows well-established lines. And we felt that this is a good separation and the Committee adopted that particular plan.

The remaining precincts in the 14th District were added to the 15th to make up the 6th Senatorial District.

The figures here, I think, fell a little high but actually we felt it was not too bad, considering the fact that 38,000 was the average that we were trying to strive for.

Judge Pence: Is it the fact that the three Senators in the 10th, who presently come from this District, have nothing to do with that alignment?

The Witness: No, I don't believe we consider the election possibilities of any of the members of the Senate prejudiced that.

By Mr. Kimura:

Q. I might point out again and refer to Exhibit 5 and show you the Ewa boundaries for the so-called west boundary of the proposed 6th Senatorial District and direct your attention to proceed towards the Koolau Range towards the sea—this being the mountains, this being the sea—that [fol. 843] it deviates from the boundary of the 15th Representative District by actually taking in a chunk of the

14th Representative District, it takes in about six or seven such precincts; whereas the representative district follows and turns to the Diamond Head direction in this fashion, does it not? (Indicating on chart)

A. Yes.

Judge Pence: As shown on the heavy black line?

The Witness: That's right.

Judge Pence: On Exhibit No. 6, is that it?

Mr. Kimura: No. 5.

Q. And the basic reason for the addition of this area, which is contiguous to the 15th Representative District in part, well, in a large part was prompted because of its contiguity or joining physical location, coupled with the attempt to increase the population size of the 15th to be approximately equal with the other senatorial districts, is that right?

A. That's right.

Judge Pence: Senator Takahashi, there is something I wondered about, and so that we may know the answer, that is, in the 15th Representative District from which three Senators are now in the Senate elected,—and I don't mean to be prejudicial—but they just happen to live there, and how far apart do they live? Can you show it on the map, [fol. 844] approximately, where their residence is? Can you show it, Mr. Kimura?

Mr. Kimura: I am not familiar with that.

Judge Pence: Can you, Mr. Takahashi?

Mr. Kimura: I have a red pencil and can mark it on here.

Judge Pence: All right.

The Witness: Senator Esposito lives—

Judge Pence: Let's put a red "E" about where you say he lives, approximately.

The Witness: I think some place in here. (Indicating)

Judge Pence: Put a red "E."

(Mr. Kimura marks on map.)

That's it. Approximately. All right.

The Witness: And Senator Porteus lives on Manoa Road and I am not sure where he lives.

Judge Pence: Put a red "P" on there. Put a red "P" right there.

(Mr. Kimura marks on map.)

The Witness: And Senator Fukushima lives in that vicinity. (Indicating)

Judge Pence: Put an "F" right there.

(Mr. Kimura marks on map.)

Judge Pence: Thank you very much. Proceed, Mr. Kimura.

[fol. 845] The Witness: After we determined that we were going to establish a districting plan made up of at least the highest number in one particular district, being four, then we also agreed to combine the 1st and the 2nd Senatorial, the present 1st and 2nd Senatorial Districts on the Island of Hawaii. This was done with the idea that whenever possible within any senatorial district, you should try to, within a basic area where a senatorial district is located, we should try to equalize it. We did this by combining the 1st and 2nd Districts on the Island of Hawaii, a district which under the proposed plan calls for 3 senators.

By Mr. Kimura:

Q. Senator Takahashi, if I may interrupt, I am referring now to Exhibit 7, which purports to show the map of the Island of Hawaii. And the heavy black line that I am following with this red pencil on the northern tip and southern tip, essentially the present boundary lines for the two senatorial districts on the Island of Hawaii.

A. Right.

Q. And under this plan you seek to consolidate the Island of Hawaii, the County of Hawaii, into one senatorial district, the 1st with 3 senators, is that right?

A. Yes.

Q. Which has a registered-voter population of 28,130?

A. Yes. I might also say that at the present time I consider the Island of Hawaii pretty badly malapportioned [fol. 846] as far as the Senate is concerned. The 2nd Senatorial District only has 7,000 voters, the average—

Judge Pence: You mean if only one were given to, let's say, the present senatorial, the 2nd Senatorial District that you now emphasize, that would only be 7,000?

The Witness: That's right, approximately 7,000, correct.

Judge Pence: And the mean figure that you have come up with on the State is what?

The Witness: 9,350.

Judge Pence: 7,000, however, falls, does it, within the generally accepted, it shows under the theory of equal proportions or would the 7,000 not be—

The Witness: It is pretty much on the border line, I think.

Judge Pence: We will have Mr. Schmitt to testify to that.

The Witness: Yes. There wasn't too much discussion on this particular districting plan, that is, districting of the Island of Hawaii.

Judge Pence: When you say there wasn't too much discussion, who were the members from the Island of Hawaii on the Conference Committee?

The Witness: On the Senate, Senator Ushijima—

Judge Pence: Neither one of the senators from West [fol. 847] Hawaii, I take it, was present?

The Witness: None of them were. But, well, in conferences sometimes you reach agreement by silence. If a plan is brought up and nobody objects, there is agreement. If there is objection, then there is a thorough discussion of that particular point. But in this particular plan, there wasn't much discussion on the combination of the 1st and 2nd Districts.

Judge Pence: Was there one time when the entire island was one senatorial district?

The Witness: I was aware of that point but it wasn't discussed. In fact, Doc Hill—

Judge Pence: He is one of the senators also.

The Witness: —he used to tell that it took him about a week to get around the island. It is a large district. And—

Judge Pence: Proceed.

The Witness: Thereafter, after we made the necessary adjustments to try to equalize the figures, the House and Senate Conferees agreed to the plan and, accordingly, we prepared the Conference Committee Report and presented it to the respective body.

That, in summary, is what happened in the Conference Committee. After that, the House voted on it. When I speak of the reapportionment plan, I refer to both the [fol. 848] temporary, provisional plan, and the constitutional amendment plan.

The House Committee Report we did also. We passed the bill, both bills, by a 1-vote margin, 13 to 12.

Judge Pence: That is in the Senate?

The Witness: That's right. Then we had a motion to reconsider, because we were informed or some of us were under the impression that unless we had a two-third vote, this matter would not even be entertained by the Court. So on a motion to reconsider, we took another vote, and there was one switch. We gained another one so that the vote stood at 13 to 12.

Judge Beeks: What was the minority view? Did they want larger districts or smaller ones in the number of members, or was there—

The Witness: The minority view, I think, as expressed by some, that the whole thing should go to a Constitutional Convention.

Judge Pence: The whole thing should go to the Constitutional Convention?

The Witness: That's right.

Judge Pence: Senator Doi was one of the most outspoken proponents of that?

The Witness: Yes.

Senator Doi: I would be very happy to testify as to my thoughts on this question.

[fol. 849] Judge Pence: Thank you. If the Court feels it necessary, we will call on you. Proceed.

The Witness: That is it. And after the vote was taken, we instructed the attorneys to proceed and to present the plan to the Court.

By Mr. Kimura:

Q. Was there an indication, Senator, expressed by members of the Senate that in the event the Court should look favorably on the plan as proposed, that a two-third vote in the Senate is a likely prospect?

A. Well, on a motion to reconsider, we did individually poll the Senators and found at least 16 of the 25 Senators would vote for the plan. And on a vote it finally ended up 13 to 12, and this is part of the politics and we tried to get as many votes as possible and when we found out that we could not get the 17 votes after the poll was carefully taken, we did release two of the Senators who had committed themselves to vote for the plan. Had we gotten another one, we could have gotten 17 votes. We did not get 17 votes so we released this commitment to us of those who wanted to vote but didn't want to vote for the plan otherwise—

Q. The number 17 is the number that is the line of demarcation as far as the two-thirds vote of the Senate?

A. That's right.

Q. Is there anything else, Senator, that you feel germane or pertinent to the plan that you would like to state to the [fol. 850] Court?

A. Well, I personally like the plan.

Judge Pence: Senator, your own personal preference is not justification, so if that is all you can say to assist the Court, we will pass that by.

The Witness: Thank you.

Judge Pence: Excuse me, Senator, not that we don't respect your opinion. However, that is not what is before us.

Judge Beeks: It may be persuasive in getting that other vote.

The Witness: I think it may be.

Judge Pence: You have no other questions at this time?

Mr. Kimura: No.

Judge Pence: We are going to take a ten-minute recess.

(A recess was taken.)

AFTER RECESS

Judge Pence: Mr. Dodge,—and that applies to any other Counsel of record here—do you have any desire to ask any questions of the Senator? That is, without waiving your position.

Mr. Dodge: I would like to refer to the Attorney General's Office first. I may not have any questions.

Judge Pence: Does the Attorney General have any ques-[fol. 851] tions?

Mr. Tonaki: Yes, sir.

Judge Pence: Senator Takahashi, will you resume the stand?

Cross examination.

By Mr. Kanbara:

Q. Senator, referring to Senate Exhibit No. 7, showing the Island of Hawaii, is it true that the area shown as the 5th Representative District and the 4th Representative District, which constitute the existing 2nd Senatorial District has a population of 7,360? I am reading from the 1964 voter registration, registered voters—

A. I don't know exactly. I was talking in terms of registered voters.

Q. I'm sorry. I meant registered voters instead of population.

A. Well, roughly, that is the figure that I recall now. I don't know exactly.

Q. And for the 1st Senatorial District, that is, the existing senatorial district, which takes in the rest of the island,

as indicated on this exhibit, the registered-voter population is 20,770, that is, in 1964?

A. Yes, as I recall.

Q. Of which 15,289 are in the 2nd Representative District which takes in the City of Hilo, is that correct?

[fol. 852] A. I don't know. We never got down to that fine detail or discussion.

Q. And the 1st and 2nd Senatorial Districts are separated by a flow of lava, lava flows and mountains?

A. As I understand, yes.

Q. Going now to Exhibit No. 5, you indicated in your direct testimony that 3 of the senators from the 4th Senatorial District live in the same 15th Representative District. Could you please, Senator, for the Court indicate similarly for the present 5th Senatorial District the residence of those senators that are in the representative districts?

A. Let's see, now. You are referring to the 12th Senatorial?

Judge Pence: The 12th, the 12th Representative District, 5th Senatorial.

A. Senator Ariyoshi, I believe, lives here.

Q. Indicate it by an "A."

A. Senator Kido is registered at Kuakini Street. (Indicating on map)

Q. Senator Kido's place of registration is indicated by a "K." And Senator Takahashi is indicated by a "T."

A. By a "T."

Q. The 12th District.

Judge Pence: All of these marks are made on Senate Exhibit 5.

[fol. 853] Mr. Kanbara: That is correct, your Honor. I am sorry.

Q. Senator, could we indicate also the residence of the other two district senators?

A. I am not quite sure where Senator Pryor lives. I think it is in Waimanalo.

Q. That is indicated by what?
A. "P."
Q. And Senator Hulten is in Kailua?
A. Kailua.
Q. Senator Hulten's residence is indicated by an "H" in the representative district.

Judge Pence: The Court will take judicial notice of the fact that Senator Pryor was an appointee and not elected.
Mr. Kimura: That is correct.

Q. Now, Senator, you mentioned in your direct testimony that the average number of registered voters represented by a senator is approximately 9,300, is that correct?
A. I have seen the figure 9,500, 9,300, yes.
Q. And the 12th Representative District has a 1964 registered-voter population of 11,500?
A. I think you are right.
Q. So on that basis, if the 12th District were left as one senatorial district, it doesn't mean that the district would [fol. 854] get one senator?
A. I presume so.
Q. And if you combined the 13th Representative District, according to the 1964 registration, in other words, if you combine the registered-voter population in the 12th and 13th Districts, we would have a total of 17,956 registered voters, approximately. And on the basis, say, roughly 9,300 registered voters per senator, that would mean that that combined district would be entitled to two senators?
A. Two senators, yes.
Q. And the 12th and 13th run from the mountains to the sea, do they not? Now, the 14th Representative District, according to my figures from the Lieutenant Governor's Office, has a registered-voter population of 18,571. That is correct, is it not?
A. I am using the same figures. You are right. The Lieutenant Governor's figures, if they are right, I assume it is correct.
Q. So that if we were to combine the 12th and 14th Representative Districts, we would have 11,500 from the 12th Dis-

trict plus 18,571 from the 14th District, which would give a grand total of 30,011 registered voters, which would then mean on the basis of roughly 9,300?

A. Three senators.

Q. Three senators?

[fol. 855] A. Yes.

Q. Would you say that the make-up of the population in the 12th and 14th Districts are somewhat similar in the sense of taking in, shall we say, the upper middle class residents of the City?

A. I think you are under the impression that that is true —maybe 20 years ago. But the complexity of the area is changing very rapidly. I think that is a matter of conjecture. I think it is changing.

Judge Pence: You think what?

The Witness: I think it is rapidly changing.

Judge Pence: Instead of being upper middle class, what would you say?

The Witness: It is an average urban community.

Judge Pence: Is that middle class, whatever that might mean?

The Witness: It is below upper middle class.

By Mr. Kanbara:

Q. And you mentioned in your direct testimony, Senator, —and is it correct?—that the conferees did not consider the composition or possibility of a constitutional amendment to reapportion and to redistrict the House of Representatives at the same time as that of the Senate?

A. No, because the conferees were not given the task of dividing the particular question. We were there to deter-

[fol. 856] mine the district boundaries of these basic areas, senatorial district areas.

Mr. Kanbara: I have no further questions.

Judge Beeks: Was it discussed at all, Senator, in connection with your approval of this bill, if the House of Representatives should be redistricted?

The Witness: If there was any discussion, I think the feeling was that the House districting plan would be left alone. The Court found it valid and has the extent in the report in which it was discussed.

Judge Beeks: Speaking solely for myself, I am beginning to have great doubts as to whether we were right in the first place.

Mr. Kanbara: I have no further questions. Thank you.

Judge Pence: Mr. Dodge?

By Mr. Dodge:

Q. Senator Takahashi, you have identified all five of the Senators in the present 5th District—three of them in the present 4th District. Would you, to bring us up to date, put the other two senators in the 4th District on there?

A. Senator Kahanamoku lives on Maunalani Heights. I think she lives some place up here. (Indicating on map)

Judge Pence: Put a "K" up there on Exhibit No. 5. That is in the 16th.

[fol. 857] The Witness: And Senator Yano is right above St. Louis High School.

Judge Jertberg: What initial did you designate for that?

Judge Pence: "Y."

Mr. Dodge: With a "Y."

Judge Jertberg: That is Exhibit 7?

Judge Pence: No, Exhibit 5, in the 16th.

By Mr. Dodge:

Q. How many conferees were there in the Conference Committee from the Senate?

A. From the Senate there were seven members.

Q. I don't know whether this makes any difference but I think we ought to have it in the record: What were their political party affiliations, of the seven? How was it divided?

A. Well, Senator Esposito is a Democrat. Senator Fukushima, a Republican. Senator Kido, a Democrat. Ushijima,

Democrat. Yoshinaga, Democrat. Yates, Republican, and myself, Democrat. It is 5 to 2.

Q. There were two Republicans and five Democrats?

A. Democrats.

Q. Do you know the political party affiliation of the members from the House?

A. Yes, Representative Wakatsuki, Chairman. He is a Democrat. Representative Tadao Beppu, Democrat. Repre-
[fol. 858] sentative James Clark, Republican. Representative George Loo, Democrat. Representative Barney Menor, Democrat. Representative Katsugo Niho, Republican. Representative George Okano, Democrat. Representative Robert C. Oshiro, Democrat. Representative Frederick Rohlfing, Republican. Pacarro, Democrat.

Q. Ten members, am I right, of the House?

A. That's right. The make-up was 7 Democrats, 3 Republicans.

Q. Three Republicans? Do you happen to know the political breakdown of the 13-12 vote in the Senate?

A. Let me say this: All in the first vote which was taken on House Bill 773—

Judge Pence: I think, Senator, we are concerned with the final vote.

The Witness: All right. The final vote, 9 Republicans voted against the bill; 2 Democrats voted against the bill.

Q. Two or three Democrats voting against it?

A. Three Democrats.

Q. And the other 13 who voted for it were Democrats?

A. That's right.

Q. So there are 16 Democrats in the Senate and 9 Republicans? Now, you are aware, aren't you, Senator, of the purpose of their being two bills to submit to this Court?

A. Yes.

[fol. 859] Q. One, a provisional one and one proposing a constitutional amendment?

A. Yes.

Q. The purpose of the provisional bill or the reason for that being that the Legislature itself has no authority to reapportion the Senate?

A. I don't quite agree with you on that.

Judge Pence: Have you been advised that way, at least?

Q. Have you been advised by our State Supreme Court and this Court has held, one, in this hearing and one in an earlier proceeding, one in the State Supreme Court—I will put it that way—that the Senate could be reapportioned under the State Constitution only by constitutional amendment?

A. I have heard views on this particular subject, the view that it can only be done by a constitutional convention or a constitutional amendment. Others take the contrary view.

Q. Well, assuming that it can be done only by constitutional amendment and that that is the position this Court is taking, is it not true that the purpose of the two bills, the two bills that the Legislature was asked to submit to the Court, one, a provisional one and one a constitutional amendment, were two separate things, one a provisional thing for the Court to put into effect as a court order,—

A. Yes.

[fol. 860] Q. —and that there was, therefore, no necessary relationship between this intermediate step for the 1966 election and on permanent plans which would be placed into effect by a constitutional amendment? Were you aware of this in your determination?

A. I am not quite sure what you are driving at.

Q. Well, were you aware of the fact in your determination as a conferee that the Legislature submitted to this Court, as far as a provisional apportionment plan is concerned, that it could be completely different from what you might submit to the Court in terms of a proposed constitutional amendment?

A. No, we were under the impression that the two plans, at least the reapportionment and the redistricting plans, were to be identical.

Q. Were you not advised by your Counsel for the Senate that these two plans could be completely different, one a provisional plan looking only to the 1966 election; and the one looking at the entire legislature—

A. No.

Q. Let me ask you this, then: Had you been so advised—

Judge Pence: Counsel, let us get the hypothetical out—

Mr. Dodge: I am tying this into his statement that there was no consideration by the conferees of any plan that [fol. 861] would have looked at the total apportionment of the entire legislature.

Judge Pence: I think that has already been covered. He said they didn't.

Mr. Dodge: So my question is speculative: Would they, had they known this? Those are the only questions I have.

Judge Pence: Mr. Tonaki?

By Mr. Tonaki:

Q. Senator Takahashi, do you recall the first plan voted by the Legislature keeping the existing districts in Oahu and allocating the senators to the 4th and 9th, to the 4th District?

A. I don't recall—I think that vote was 17 to 8, barely making the necessary two-thirds.

Q. Can you give a breakdown on the party affiliation of the 8?

Judge Pence: Does that become material to this?

Mr. Tonaki: Yes, your Honor.

Judge Pence: Very well. Proceed to answer the question.

A. Well, we took several votes. And I don't recall, there were some Democrats who voted against the plan and Republicans who voted against the plan, but I don't recall the definite vote of the Senate at the moment.

[fol. 862] Q. Of the 17 who favored the original plan, do you know why they switched and did not vote for the latest plan?

A. No.

Q. You don't know? This goes to the status of House Bill 773. Does it go to the people in the 1966 General Election without further action of the Legislature?

A. As it stands today, no.

Q. What more needs to be done?

A. As I understand it, the House will have to vote on it again, two-thirds vote, because they just served notice to the Governor several days ago that this notice is required of the Constitution before final vote is taken. As far as the Senate vote is concerned, we never got the required two-thirds vote also. But we did pass it by a majority. And if it stands as it is now, it will be necessary for us to take this matter up at a succeeding session of our Legislature to get the matter voted on again with the majority of the two-thirds.

Q. Does it require two-thirds the next time?

A. No.

Mr. Tonaki: Thank you, Senator.

Judge Pence: Mr. Kanbara?

By Mr. Kanbara:

Q. Senator, in the 15th Representative District, according to the 1964 registration, the number of voters there is 32,302?

[fol. 863] A. That's correct.

Q. Which would mean that that district, if that were left as a senatorial district, it would be entitled to three senators?

Judge Pence: Which one is that again?

Mr. Kanbara: This is the 15th Representative District.

Judge Beeks: Having six representatives itself?

Mr. Kanbara: Yes, that's correct.

Q. Now, with respect to House Bill 773, the constitutional amendment, before that bill went into conference, it is my understanding, and is my understanding correct, that the

bill then provided for a 1st Senatorial District and 2nd Senatorial District?

A. Yes.

Q. With 2 and 1 senators respectively?

A. That's correct, yes.

Mr. Kanbara: Thank you.

Judge Pence: Any other questions? Thank you, Senator.

* * * * * * *

[fol. 864] Robert Schmitt, a witness called by the Intervenor-Plaintiffs, having previously been sworn, testified as follows:

[fol. 865] Direct examination.

Judge Pence: Mr. Schmitt, you have already been sworn. Proceed to testify.

By Mr. Kimura:

Q. Will you state your full name, please?

A. Robert C. Schmitt.

Q. And, Mr. Schmitt, you are the same person that testified by that name in this proceeding?

A. Yes.

Q. Now, you are reminded that you are under oath. Mr. Schmitt, have you had an opportunity to examine and review the Senate Redistricting Plan for the State of Hawaii, Reapportionment and Redistricting Plan as contained in the Plan submitted to the Federal District Court in this matter?

A. Yes, I have.

Q. And this is contained in House Bill No. 773, S.D. 1, C.D. 1; and House Bill No. 987, S.D. 1, C.D. 1,—

A. Yes.

Q. —referred to in the pleadings?

A. Right.

Q. Now, Mr. Schmitt, I ask and direct your attention to Exhibit 8, which shows the proposed senatorial district in

accordance with the plan submitted, and ask you whether or not the allocation of the number of senators with respect to the 1964 registered voters listed on this exhibit is based [fol. 866] upon an allocation on the method of equal proportions employed under State Constitution with respect to the House of Representatives?

A. Yes. I independently checked the totals on registered voters against the original source, the Lieutenant Governor's report on 1964 votes cast. And I also recomputed the number of senators based on the method of equal proportions and I came to the same results as indicated on that table.

Q. And, Mr. Schmitt, with respect to the districting of the plan as submitted for the State Senate, do you have an opinion with respect to the rationality and the logical districting of the plan as submitted?

A. Yes. My opinion, based on criteria—

Mr. Kanbara: Objection, your Honor.

Judge Pence: One moment. Let's see the basis.

A. (Continuing) —on the basis of substantial equality of the number of registered voters, on the use of longstanding statistical and taxation and land division boundaries, on contiguity and compactness, the districts seemed to be well thought out.

Judge Pence: You didn't have a chance to object, Mr. Kanbara. Do you move to strike?

Mr. Kanbara: I move to strike it.

Judge Pence: What is the basis?

[fol. 867] Mr. Kanbara: I don't think Mr. Schmitt is a legislator.

Judge Pence: The Supreme Court feels it is more than a matter of legislative policy, and the motion is denied.

By Mr. Kimura:

Q. Will you proceed, Mr. Schmitt.

The Witness: May I have that?

(The reporter read the question and answer.)

Q. Now, Mr. Schmitt, in directing your attention to the plan as submitted, well, particularly with districting on Oahu, I direct your attention to Exhibit 6 in evidence and direct your attention to generally the senatorial district beginning with the 3rd Senatorial District, district population, 27,703. Those are the registered voters. It further is indicated with the registered-voter population of 35,780; the 5th with 39,361; the 6th with 40,062; and the 7th, 37,336. Would you like to specifically cover these senatorial districts with your comments and views as you can apply these different criteria in these same number of different districts?

A. Yes. First, I think I might mention a consideration in the use of multimember districts rather than single member districts.

In this particular instance, if we can refer to the law of large numbers, well known to the statisticians and, indeed to laymen, as, for example, with reference to baseball, it is [fol. 868] usually felt that in a 54-game season, the teams sort themselves out pretty well and anything can happen in a 7-game world series. The same thing is true in the trend of registered voters. It has a small area with a large number of small districts which would be subject to considerable fluctuation in a short period of time in the number of registered voters; whereas a small number of large districts or pockets, pocket districts, would be subject to much less fluctuation in the number of registered voters, that is, proportionately. This is over a period of a decade, a large number of small districts would tend to move in very divergent directions; whereas in a few large districts, areas of growth within any district would tend to balance out areas, and vice versa.

Accordingly, there would be much less discrepancy towards the end of an apportionment period, I assume, than in the case of smaller districts.

I prepared a hypothetical set of five districts based on the 1950 population. I am not telling here by registered

voters because we didn't have these districts in 1950, but I took population into the 1950 as a basis for the hypothetical breakdown of five districts in Oahu. And I have another set of twenty-nine districts.

In using five districts, I found a range over—

Mr. Dodge: May it please the Court, this information, was this prepared just for the purpose of this hearing?

[fol. 869] The Witness: This I did this morning.

Mr. Dodge: Well, I object to any testimony with regard to that, because, obviously, if it was prepared this morning, it was not before the Legislature and it would not be the basis for the Legislature to make its determination.

Judge Pence: Would it be your position that if the Legislature by accident arrived at the same result, that the testimony could not justify its action?

Mr. Dodge: Well, I don't think that is quite the point.

Judge Pence: They have submitted a plan. Is it your position that unless they, upon what they consider, can justify it, then the mere fact that it might be justified by a matter which they didn't consider, would not be relevant in our determination?

Mr. Dodge: I understood Mr. Schmitt's testimony to be a moment ago that he is about to read from his hypothetical situation that might have occurred in some—

Judge Pence: He is using that to illustrate, as I understood it, as the Court did, his law of large numbers.

Mr. Dodge: If this explains the law of large numbers, I must object that it is immaterial and irrelevant.

Judge Pence: All right. Why do you say it is irrelevant?

Mr. Dodge: Because the law of large numbers, as I [fol. 870] understood it from what he just said, assumes that they base a multimember of senatorial districts to four members. And this is an assumption that this is what this proceeding is about. I don't think we can get that far.

Judge Pence: Mr. Kimura?

Mr. Kimura: I think in part or I think fully Counsel may be answered by reference to the Conference Committee Report that we have submitted to the Court in support

of our position, in which the Conference Committee Report definitely states that a reason for embarking on this multi-member district plan, as contrasted from the single member—and I read from page 5—

Judge Pence: I am shutting you off. The Court is ready to rule. Proceed.

A. In this high set-up, five districts with substantial equality of population, beginning with the decade, by the end of the decade there has been a decline of 4 percent, 4 percent of the slowest, and a gross of 91 percent in the most rapidly growing, a decline of 4 percent. (Indicating on chart.) And the remainder came between those two points—this 19, this 19 district breakdown. The range was from a decline of 33.6 percent to an increase of 141.7 percent, almost 175 percentage point span. Or to express it in another way, these areas which were quite similar in size at the beginning of the period, for example, the 19 [fol. 871] district breakdown at the beginning of the decade, a range of about 17,900 to 19,500 in population. By the end of the decade, the 5th District breakdown had a range of the lowest of 16,800—I'm sorry, it's 16,100 to the highest of 34,484, almost about 2 to 1. Whereas in the 19 district breakdown, it was a span of 3 to 1, from 12,200 to 46,800.

In any such districting plan, I must emphasize,—it is more purely hypothetical—there would be a tendency for the areas to become very divergent in population or registered voters toward the end of the decade. And within a very few years some areas, declining areas, would be in effect greatly over-represented; whereas growing areas would be unrepresented. This effect would be minimized by the use of larger distance which would tend to have greater stability.

Judge Beeks: Of course, if you divide the State into two, you reduce that fluctuation.

The Witness: Exactly. Now, you asked me specifically about certain district lines. I was very impressed as a statistician to see many of the boundaries chosen by the

Conference Committee are of a long-standing statistical boundaries. Now, statistical boundaries are not in themselves as meaningful as economic boundaries. But it so happens that in Hawaii, where we have excellent statistical boundaries that have endured for many years—for example, the windward side consisting of Koolauloa and Koolaupoko judicial districts has formed a unit since [fol. 872] earliest antiquity. The ancient Hawaiians used these what we now call judicial districts and they were almost exactly the same boundaries as exist today.

The same is true of the breakdown in the 4th and 5th Districts—

By Mr. Kimura:

Q. Excuse me. One second, Mr. Schmitt. When you testify as to Koolauloa and Koolaupoko, that is the proposed 3rd Senatorial District?

A. That's right.

Q. As indicated here on Exhibit 6?

Judge Pence: This would be the entire windward senatorial?

Mr. Kimura: Yes.

The Witness: That has long been used for statistical analysis. That happens to be consistent to the 9th Tax Zone on this island. It is, of course, a political area, the 8th Representative District at the present time. The breakdown between the 4th and 5th Senatorial Districts, which runs between Fort Shafter and Kalihi, is also a long-standing boundary.

Q. May I interrupt just one second? This boundary, this area here marked "4," this large geographical area, and 5th which adjoins it, that is Diamond Head or Koko Head of this area, is that right, on Exhibit 6? (Indicating on map)

A. Yes.

[fol. 873] Q. All right.

A. The boundary, the boundary between Kalihi and Kawaihoa is quite a distinct boundary, distinguishing the

military area from the civilian area. It has been a basic boundary since the very earliest days. In fact, the 5th District is almost identical to that which was used in the first two missionary censuses back in 1830-36 as representing Honolulu City.

Q. May I interrupt one second again, Mr. Schmitt? As to Exhibit 6, we see this short line coming down from the Koolau to the ocean, this particular line. (Indicating on map) This particular line is the same as shown on Exhibit 5 on a larger scale, as indicated—

Judge Pence: Indicating the boundary in red on Exhibit 5 between the 4th and 5th Senatorial Districts?

Mr. Kimura: Yes.

A. There has been some criticism of moving the line from the Honolulu-Ewa boundary, which goes past Red Hill, and between NHA-T and NHA-1, I suppose, down Plantation Drive. However, the Moanalua section is far closer in the social and the proper economic statistics to the area Ewa of it than the area Waikiki of it; that is, Moanalua is quite similar in its population characteristics to Paawa, Aiea, and Pearl Harbor area. It is not similar to Kaimi. Out of 13,635 military housing units on the island, in the State—

[fol. 874] Judge Pence: How much is that figure?

The Witness: 13,635 as of June 1, 1964, in the State.

Judge Pence: This is military housing units?

The Witness: That's right, owned by the Armed Forces, owned and operated by the Armed Forces. And 12,383 fall in the 4th District as we have defined it; 1,124 in the 3rd District; and 29 to the neighbor islands. And 99 in the 5th, 6th, and 7th Districts combined. In other words, we have defined here in the 4th District an area of community of interest, of similar occupational background, that is, largely Armed Forces and their dependents, plus many civilian employees of Pearl Harbor, Barber's Point, and Schofield Barracks. And it does provide a very meaningful boundary.

The breakdown of the 5th and 6th Districts deviates from an existing political boundary. However, it is quite close to the boundaries used in census tract statistics by the United States Bureau of the Census. It also very neatly separates Kakaako from the central business district and it does seem to provide for a clear distinction between areas of different social and housing, economic characteristics.

The division between the 6th and 7th Districts, with the exception of a small jog in the St. Louis Heights area, is identical to that between the 2nd and 3rd Taxation Zones. It corresponds to an old ahupua line and has been [fol. 875] used for statistical purposes.

Also, I think we would agree that there is a considerable difference between the typical residences on the Koko Head side of Diamond Head as distinguished from the residences Ewa of it. For example, the 6th District has most of the high rise and most of the apartments, residential structures in Hawaii. The area on the Koko Head side of the 7th District is primarily a single family housing district.

I think that pretty well covers the statistical significance of these boundaries.

By Mr. Kimura:

Q. On the Island of Hawaii, shown on Exhibit 7, there has been a consolidation of the existing 1st and 2nd Senatorial Districts, East and West Hawaii. Would you like to state your views on this proposed consolidation, in view of the factors and considerations that you have testified to earlier?

A. Yes. I have two points in particular. First, based on the existing 1st and 2nd Senatorial Districts, there would be a relatively large difference between the number of voters per senator in the 1st as against the number in the 2nd. In the 2nd District, I would perceive that one senator would have the smallest number of voters of any of the districts in the State, and would, accordingly, be

most over-represented. Now, that is not to say that it is on the verge of being washed out of existence under the proposed rule if the ratio falls to one-half of the over-all [fol. 876] average, that the Governor should redistrict. However, it has the greatest discrepancy existing in the senatorial districts. It tends to, as the result, over-represent the 2nd District and under-represent the 1st.

There is also the question of shifting of population and registered voters. Since 1930 the 1st District has been losing population. I don't think that is true of the registered voters because we are getting a smaller proportion of aliens on the Big Island. However, in population, the 1st District has been in decline for 35 years, and there seems to be no prospect of an early reversal of this trend.

Since 1950, however, or the late 1940's, the West Hawaii side, the 2nd District, has been growing. And in the last few years, South Kohala, North Kona and South Kona Districts were the only three on the Big Island that increased in population. And they seem to promise a considerable future increase. Now, this would mean that at the end of a ten-year period, there would be a very visible shift in the proportion of population on the Big Island in the 1st as against the 2nd, and would tend by the end of the decade to over-represent the 2nd and greatly under-represent the 1st. Of course, this can be corrected by more frequent redistricting. However, by election at large, the effect of geographic shifts within the County would be effectively compensated.

Q. Now, Mr. Schmitt, based on the criteria that you [fol. 877] have previously enumerated, do you have an opinion as to the comparison on the rational divisions of the existing representative districts as compared to the proposed senatorial districts?

A. Many of the representative districts are imperfect from these criteria. Some are far too small. I might point out especially the 1st District on the Big Island, the Kalihi-Kai District, the 12th and 13th on this Island. Some of them are too large. The 15th is one, obviously. The 16th

is strung out terribly, strung out in an elongated fashion. Many are highly heterogeneous in their social and economic housing characteristics. And certainly they have a very wide variation in size, that is, population over registered voters. They also diverge very considerably from historical statistical boundaries—

Q. In the light of that, how would you compare that with the proposed senatorial districts?

A. I would say this senatorial district, as proposed, shows a good deal more logic and meaningfulness than the existing representative district.

Q. Now, Mr. Schmitt, have you had an opportunity to read the Conference Committee Report No. 1 of the State Senate, addressed to the Honorable Kazuhisa Abe, President of the Senate, with respect to House Bill No. 773, S.D. 1, Conference Draft 1?

[fol. 878] A. Yes, I have a copy before me. I have read it.

Q. Have you had a chance to study the contents thereof?

A. Yes, I have.

Q. Now, in that Conference Report, there appear a number of so-called justifications or reasons for the distri ting of the Senate as proposed. Do you have a comment on such reasons or justifications advanced with respect to the proposed senatorial districting?

Judge Jertberg: Before the witness answers the question, I would like to inquire of the witness, did you contribute to any extent in the preparation of the Report?

The Witness: Not at all. It is the first time I saw it, the first time I saw it, I guess, was yesterday.

Judge Jertberg: Excuse me, Mr. Kimura.

Mr. Dodge: I was going to make another objection, may it please the Court, as to the question just posed to the witness. I think his opinion of what the Legislature said as to the Committee Report is completely irrelevant to this proceeding.

Judge Jertberg: Well, it seems to me that the Report is before the Court.

Mr. Dodge: Yes.

Judge Jertberg: And I doubt very much if the witness' explanation, elucidation of the Report, would be relevant. [fol. 879] Judge Pence: The objection is sustained.

Judge Jertberg: I don't suggest that there would be anything improper about it, but I doubt if you would contribute anything.

By Mr. Kimura:

Q. When was the first time you saw this Committee Report?

A. Last night, I suppose.

Q. Well, were you called upon by the Conference Committee on H.B. No. 773, S.D. 1, to appear or testify on the Committee's deliberations?

A. Not at all. My only relationship to the Conference Committee was making some computations that are in fact not even identified, not identified as coming from the Conference Committee. But I recognize that some of the work that I did must have been at the request of the Committee. However, I had nothing to do with the Conference Committee as such and no discussion with them.

Q. This was primarily on the allocation of senators to the different districts based on the method of equal proportions?

A. That's right, simply computational work in which they said how many senators would come from such and such district for improving it.

Q. But actual establishment or defining of the senatorial district boundaries, your opinions were not called upon? [fol. 880] A. They were neither asked for nor given.

Judge Beeks: Well, we are not in the same fortunate position.

Mr. Kimura: I have no further questions.

Judge Pence: Mr. Dodge?

Cross examination.

By Mr. Dodge:

Q. Mr. Schmitt, with regard to this large number, if we have a single district for the entire State, the law has no application?

A. That's right.

Q. And if we have 25 districts or a 25-member Senate, in other words, if we rule on the single member district, it would have no application?

A. Would you repeat that?

Q. If we assume we are going to have single member districts, a 25-member Senate, the law of large numbers has no application?

A. Yes, it has. That was my point.

Q. But your point was on the assumption that if we have tolerance in the number of districts that we have, some tolerance in the number of Representatives and Senators to be elected from some districts, that is the only time the law applies, when you have no choice.

[fol. 881] A. The larger the number of districts, of course, the smaller the number of persons per district.

Q. True.

A. And the greater the amount of fluctuation over the time that would be expected from district to district.

Q. I said, if you assume that you are going to have 25 districts for 25 Senators, is it important what the law of large numbers says, if this is the basic assumption you have to work with?

A. I suppose if the situation is defined in those terms, and if we are going to accept the fact that there wouldn't be over-representation towards the end of the decade and in some areas under-representation, that is the way it is defined. However, I felt that it would be desirable to avoid such divergence towards the end of an apportionment period.

Q. But is there not provision made for periodic reapportionment to correct it and might it not be that that is the

reason for this very periodic reapportionment to correct these differences in growth that you are speaking of?

A. Of course, over a decade—a decade may be too long, it is not the same, and you tend to minimize this discrepancy over the period, whatever its length.

Q. So it is your opinion that you don't agree with apportionment every ten years and you don't agree with single member districts?

[fol. 882] A. If we had single member—

Q. Would that be correct? I am just trying to figure out why—

Judge Pence: I have listened to the witness. I don't think he said that he doesn't believe that we should have reapportionment every ten years. He simply stated, as I gathered, that since we go on the assumption that we are going to have reapportionment every ten years,—inasmuch as the Supreme Court said maybe that is so—that then he worked on that assumption, if we would have it every ten years. Is that correct?

The Witness: Right.

Judge Pence: Then based upon that assumption, the testimony is that what you feel would be the optimum conditions?

The Witness: That's right.

Judge Pence: To try to get the best means during that ten-year period, is that it?

The Witness: That's right. To minimize the amount of discrepancy that would develop over a decade.

Judge Pence: Proceed.

By Mr. Dodge:

Q. Again I repeat, if we had a single district for the entire Senate, you wouldn't have a problem?

Judge Pence: You mean if you were forced—

Judge Jertberg: You are talking about the election of [fol. 883] Senators at large?

Mr. Dodge: Yes.

Judge Jertberg: The problem of large numbers would have no effect, not if there were a sngle district, if everybody were elected at large?

Judge Beeks: If you get to a district where you have two families and one moves away, you have a difference is fluctuation.

Judge Pence: Mr. Kanbara?

By Mr. Kanbara:

Q. In your analysis of the existing House districts you mentioned that they had quite a heterogeneous occupational population.

A. That's right.

Q. I guess you had in mind the 15th District.

A. 15th is a good one.

Q. How is it heterogeneous? Say from an ethnic standpoint, how is it heterogeneous? How would you say that the 15th District is heterogeneous?

A. Well, Moiliili at the time of the 1960 census had a higher proportion of persons of Japanese ancestry than any census tract on the Island. Waikiki, which is also a part of the 15th District, was second highest among the civilian census tracts in percentage of Caucasian residents. In fact, there is a very sizeable difference. For example, [fol. 884] you get up into incomes that are much higher than they are in some of the parts of Moiliili or McCully. For example, in Waikiki the rent level ranges greatly; it is the lowest in the central district and getting higher as you move in both directions, both mauka and makai. And there are differences in occupational status as well. There you have the high level professional, technical, managerial people who tend to live either in some of the nicer apartments in Waikiki or in upper Manoa; whereas operatives, laborers, clerical workers, middle and some lower middle income people live in the central part of the district. It is not by any means a homogeneous district.

Q. How would you compare, say, the 12th, 13th and 14th, generally speaking, from the income level standpoint?

A. As I recall, one of those, the 14th, includes Nuuanu. And Nuuanu, especially up towards the Old Pali Road and upper part of Nuuanu, is a very distinct socio-economic area. It has the highest proportion of widows in the State, for example.

Q. Wealthy widows?

A. Yes. The median age is the highest of any part of the State in Nuuanu. It has the lowest sex ratio. I hasten to say that sex ratio means the number of males per number of females. On the other hand, in Kapalama district, you have one of the highest sex ratios in the State.

Judge Pence: The most men and the fewest women?

[fol. 885] The Witness: That's correct. They are ethnically quite different. Haoles up in Nuuanu; Filipinos around Aala Park. The incomes diverge a good deal; many differences in occupational status.

Q. How would you characterize, say, the 13th Representative District?

A. That is the one in Kalihi-Kai?

Q. Yes, Palama, Kalihi.

A. That is relatively high homogeneous; it has very little of the upper socio-economic status and a very high proportion of persons of foreign birth or parentage of Asiatic ancestry.

Q. Would it be correct to say that you will find more people in the laboring classes in the 13th District than the 12th?

A. Kam is what—Kalihi?

Q. Kam Heights, Alewa Heights?

A. Yes. I'd say, yes.

Q. How would you compare the 16th?

A. I think the most important difference is political. In the 16th there are four Democratic Representatives and in the 17th four Representatives, which would represent a very basic difference in the political philosophy.

Q. How would you compare the difference in occupational classes of the people in Palolo Valley in the 16th

[fol. 886] District against Aina Haina and the Waialae-Kahala sections in the 17th Representative District?

A. Waialae-Kahala had a median family income in 1959, four persons counted in the 1960 census, of almost $16,000. It was the highest median family income of any census tract in the State. Palolo—and this is a census tract that includes Palolo Housing—was in the lowest half dozen.

Judge Pence: Do you know that figure offhand?

The Witness: It was around $3,000 median. The lowest of all is Chinatown, the section just Ewa of Smith.

Judge Pence: Around the river?

The Witness: From the harbor to Beretania, between Nuuanu Avenue and Nuuanu Stream.

Judge Beeks: Is that around the Ala Wai Canal?

The Witness: No, this is just Ewa, downtown Honolulu.

Q. How do they differ in occupations, Palolo as against the section in the 17th District that I am referring to?

A. Well, in occupational status, highly professional, managerial and such in Waialae-Kahala and Aina Haina, Wailupe Peninsula; as against Palolo which would tend to be the lower socio-economic status, laborers, operatives, clerical workers.

Q. Calling your attention now to the exhibit showing the Island of Hawaii, Mr. Schmitt, you said that the population in West Hawaii is growing; whereas in East Hawaii it is [fol. 887] declining. Is that right?

A. That's right.

Q. So that in time it is not unlikely that there would be a relative evening up of the population? In other words, the disparity would tend to be reduced if the present trend continues?

A. I would say if we apportion now by existing districts, which would give us two Senators, only one in the other and reapportion again ten years later, that there would very well be a reversal of this number, that is, the Hilo side might get only one. Now, that is just a rough guess; population projections are notoriously inaccurate in that re-

spect. But there is a decided geographic shifting of population.

Q. Now, you have indicated in your comparison of the Senate and House districts, that is, the proposed Senatorial districts compared with the existing House districts, you have indicated a great homogenuity in the House districts. When you combine several House districts within a larger Senatorial district, would you not be compounding the heterogenuity? What is the basis for saying that you have greater heterogenuity in the Senatorial districts?

A. Here, I think, we are dealing with two aspects. First is absolute range, and the other is dealing with measures of the single tendency. In statistical terms, as you increase the size of the area, you increase the absolute range within [fol. 888] that area. There is a far greater internal variation in a large area than in a small area. However, the very fact of the extreme at the same time heterogenuity existing House district, would tend to create a clustering towards the middle by grouping them and producing a more normal distribution within the combined districts.

Q. Now, Mr. Schmitt, the 13th District is relatively homogeneous in the sense that you have a lot of laborers and low income groups there. The 12th District, on the other hand, there you have a higher income, higher level occupational group. Is it correct to say—and you cannot say otherwise—that if you combine those two, you have homogenuity; whereas, formerly you had homogenuity as between the 12th and 13th?

A. Well, the boundary between those two is, very unfortunately right now, between those two, the 12th and 13th—

Q. I am talking about the 12th and 13th.

A. —the 12th and 13th—I think the distinction is more by the unfortunate location of the boundary. Of course, by combining those two, you would in that instance increase the dispersion of any socio-economic barriers.

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[fol. 889]

REMARKS OF DEPUTY ATTORNEY GENERAL KANBARA

April 16, 1965

Mr. Kanbara: May it please the Court, the direction of the Court is clear and explicit. It is so clear and to the point that I am constrained to read it back. We believe that the Senate should be redistricted into single senatorial districts, although we may approve 2-member districts if and only the Legislature can affirmatively show reasons therefor. There may very well be valid reasons for one or two 2-member districts in the neighboring islands. But we perceive no justification whatsoever for other than single member districts on the Island of Oahu, particularly the heavily populated areas thereof.

We submit that the Court's position is well-taken and it is based on sound principle. In *Reynolds* vs. *Sims* the Chief Justice mentioned that "conceded the basic aim of legislative reapportionment is fair and effective representation." This is pointed out in our memorandum to the Court of March 24th. I might add, and I don't think it would be presumptious to add to that, that the basic aim is fair, effective and equal representation of all citizens. In *Reynolds* vs. *Sims* the Chief Justice went on further to say,

"By holding that as a federal constitutional requisite both houses of a state legislature must be apportioned on a population basis, we mean that the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable."

At the risk of sounding pedantic, I think it would be in [fol. 890] order to consider some basic principles of democratic government. The democratic ideal, of course, is that of the so-called pure democracy where every citizen would have an opportunity to cast his vote on issues affecting him. Well, we have the example of early societies, the New England Town Meeting and Switzerland. Of course, with the

growth of population and the growing complexities of the issues, this is not feasible. So we have representative democracy. And I think Judge Maris expressed the point very well when he said in *Drew* vs. *Scranton,* 229 Fed. Sup. 312 at 326, that

"Theoretically, at least, when an electorate is called upon to select from their number a smaller group to speak and act for them in a representative assembly, each voter should participate in the selection of one of the representatives only. For since the persons elected are to comprise a boiled down reflection, as it were, of the larger electorate, and since each of them, therefore, in a very real sense stands in the assembly in the place of a group of voters, it would appear to interfere with and dilute the voting rights of others for a voter to participate in the election of more than one representative. It is doubtless upon this principle that the single-member district system has become the widely accepted method of electing the members of Congress and of many other legislative bodies."

Judge Pence: Wasn't he then talking about one of the Houses?

[fol. 891] Mr. Kanbara: Yes, your Honor. I note that in the Pennsylvania situation the Senate was the single member house, or there was some distinction.

Judge Pence: There was a single member Senate?

Mr. Kanbara: Yes, your Honor.

Judge Jertberg: To what extent was Judge Maris' opinion affected by the action of the Supreme Court?

Mr. Kanbara: The Supreme Court did not reverse the decision. It vacated the decision and remanded it for reconsideration.

Judge Jertberg: Well, primarily it reversed it.

Mr. Kanbara: The Supreme Court of Pennsylvania had referred the matter to the legislature. I might say that in a single member district more than half of the people in this district have given the authority to one man to vote in their name, as to what taxes they shall pay, what criminal

laws they shall be subject to, and what benefits they are to receive for their tax dollars. One of the real evils of this multimember districting system is the submergence of minority groups. We have an excellent example of this where we find East and West Hawaii are separated by a barrier of mountains and lava flows. Now, East Hawaii has a population of about 7,000; West Hawaii has a population of about 20,000. Now, I might mention that of that 20,000—

Judge Pence: I think you have it reversed.

Mr. Kanbara: It is reversed. I'm sorry. West Hawaii has about 7,000 voters; East Hawaii has 20,000, and about [fol. 892] 15,000 of the latter are in the region where Hilo is located. Now, it is obvious to me, if East and West Hawaii are combined into one 3-member district, that you are submerging the voters in West Hawaii thereby.

Judge Pence: Well, you are going simply on numbers, then.

Mr. Kanbara: Beg your pardon?

Judge Pence: In other words, your idea of submergence is simply by numbers?

Mr. Kanbara: Not only that. There are differences in the backgrounds of the people involved, their interests; they differ in this particular instance between East and West Hawaii. I think the Court gave an excellent illustration in its decision on the subject of submergence.

Judge Pence: Thank you very much.

Mr. Kanbara: Now, Keaukaha is predominantly Hawaiian and urban. There was a suggestion of combining Keaukaha and Puna. Puna had a population of 1,700 predominantly of Japanese ancestry and agricultural. The Court correctly pointed out that Keaukaha would have been submerged in that situation. What we have here, as Mr. Schmitt indicated, is that there is a wide divergence in the population from the standpoint of race, occupation, income grouping and interests. (Indicating on chart) And it is no surprise that there has been no representative who resides in the section around Waikiki. I don't understand the

Court to say that only single member districts are permissible. I understand the Court to say that there should [fol. 893] be single member districts because they rest on the principle of democratic representation, and that should be the rule. The Court does not condemn multi-member districts provided the legislators can show justification therefor. We submit that in the testimony before the Court there has been no such justification presented. According to the testimony of the chairman of the Judiciary Committee these were some of the considerations entering into adoption of the plan that is before the Court. First of all the conjecture that with large districts you avoid so-called peanut politics. I don't know what this says for the majority of other state legislatures where single member districts are the rule. Also, that they did not feel it proper that the Senate districts should coincide with the House districts. Traditionally the Senate represented larger districts than did the House. He did mention that the Conference Committee did not take into consideration the fact that the House is multi-member with six representatives from the 15th representative district. These are what you might call negative considerations. We submit these are not affirmative substantial reasons that the Court is speaking of. And the districting cannot be called reasonable on the basis of those justifications.

It is interesting also to note that there was no member on the Conference Committee who would be adversely affected by the districting here involved. For example, West [fol. 894] Hawaii. And it is also curious that three of the Senators, of the present Senators from the 5th District, and who happen to be from the 12th District, are now placed in a proposed Senatorial District that would have four Senators. The same is true for the three Senators from the 4th District who now live in the 15th Representative District.

Judge Beeks: Mr. Kanbara, assume that this Court disapproves the matter that is now before us, what do you

think the Court ought to do? In other words, do you agree with Mr. Tonaki or do you have something else?

Mr. Kanbara: We have not suggested a remedy in this particular case. But I would disagree with Mr. Tonaki, that the matter should be presented to the Legislature.

Another difficulty or defect in the multi-member district, especially when viewed in the light of the existence of single member districts, is the point that in fact you violate the one man one vote principle, in the sense that a man in a four-Senator District gets to vote for four people. I don't think that is an answer to say it is O.K. because a man in a four-Senator District, or rather the population is four times that of the population in the one-Senator District, because the fact of the matter is that a Senator, being a politician, has to consider the benefits of suffrage that the voters bring to him. Here again I think certainly a voter in a four-member district will not have only four votes for the representative but he will have four members of the [fol. 895] House who will be especially concerned with his views and interests and amenable to his persuasion. The voter in a single district will have only one representative to look to to express his views and express his interests.

We submit that we do not have fair, equal representation where you have a mixture of single and multiple member districts.

Judge Jertberg: Whose vote is being diluted under such an arrangement, the voter living in a single representative district or the voter living in a multiple district?

Mr. Kanbara: In the sense that the voter in a single representative district will have only one vote to look to, you might say his vote would be weakened or diluted, than the one in the larger district. I might mention that voting, important as it is, is only a means to an end, and the end is fair representation. And the mere fact that the votes are in proportion from the population standpoint, does not mean that upon a showing of discrimination it will stand the test of Constitutionality.

I would also mention that in the case I cited earlier there was a situation there where you had a senate consisting

of single member districts, and in that regard it was distinguishable, and the Pennsylvania Supreme Court took pains to point out that in the absence of any reasonable justification such districting, this type of mixed districting, might be the result of partisan advantage.

[fol. 896] Judge Beeks: Is the Supreme Court of Pennsylvania in that case talking about State Constitutional or Federal Constitutional?

Mr. Kanbara: I believe they are talking in terms of the Federal Constitution.

Judge Beeks: I wonder. If my recollection is correct, the United States District Court in New York approved a final representative apportionment there as being Federally Constitutional. Then I understand the same Bill was attacked in the State Court and held un-Constitutional from a State Constitutional standpoint because of certain gerrymandering features. That is my recollection. I haven't seen the last opinion but that is my recollection of the situation.

Mr. Kanbara: Now, the fact that this particular plan may be the best that we could expect from the Legislature,—and I submit that the Legislature has done probably the very best it could under the circumstance—we do not feel that that is justification for the Court to accept the plan. It ought to be one that the Court firmly feels is Constitutional. Otherwise we would simply have a Pandora's box of further litigation challenging such a plan if it were put into effect.

Therefore, I close by respectfully submitting that the Court find the plan not acceptable.

Judge Pence: Thank you, Mr. Kanbara.

[fol. 897] Reporters' Certificate to foregoing transcript (omitted in printing).

[fol. 898] Certificate of Clerk (omitted in printing).

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

[fol. 899]

PLAINTIFFS' EXHIBIT 1

Area and District	1960 Population *	1958 Reg. Voters **	1960 Reg. Voters **	1962 Reg. Voters **	Present No. of Legislators	Reapportionment by Method of Equal Proportions Based on: Population 1960	Reg. Voters 1960	Reg. Voters 1962
State of Hawaii	632,772	175,317	202,059	221,650	76	76	76	76
THE SENATE								
First - Hawaii	44,297	19,031	19,266	20,053	5	1	2	2
Second - Hawaii	17,035	6,503	6,793	7,141	2	1	1	1
Third - Maui	42,855	16,755	17,539	18,325	5	2	2	2
Fourth - Oahu	182,307	62,398	73,981	80,490	5	7	9	9
Fifth - Oahu	318,102	59,249	73,142	83,834	5	13	9	10
Sixth - Kauai	28,176	11,381	11,338	11,807	3	1	2	1
THE HOUSE								
First - Hawaii	5,030	2,209	2,257	2,319	1	1	1	1
Second - Hawaii	31,553	13,836	14,036	14,706	3	1	3	2
Third - Hawaii	7,714	2,986	2,973	3,028	1	1	1	1
Fourth - Hawaii	11,369	3,862	4,073	4,239	1	1	1	1
Fifth - Hawaii	5,666	2,641	2,720	2,902	1	1	1	1
Sixth - Maui	7,138	2,560	2,574	2,739	1	1	1	1
Seventh - Maui	35,717	14,195	14,965	15,586	4	3	3	3
Eighth - Oahu	68,281	13,876	18,369	22,450	4	6	5	5
Ninth - Oahu	42,816	5,929	7,410	7,973	2	3	2	2
Tenth - Oahu	95,118	12,926	17,003	20,861	4	8	4	5
Eleventh - Oahu	57,743	10,525	12,553	14,401	3	5	3	3
Twelfth - Oahu	25,552	8,372	10,000	10,889	3	2	3	3
Thirteenth - Oahu	28,592	7,621	7,807	7,260	2	2	2	2
Fourteenth - Oahu	42,476	14,134	16,056	17,305	4	3	4	3
Fifteenth - Oahu	60,125	21,063	25,869	28,685	6	5	6	7
Sixteenth - Oahu	42,750	13,746	16,176	17,072	4	3	4	4
Seventeenth - Oahu	36,956	13,455	15,880	17,428	4	3	4	4
Eighteenth - Kauai	28,176	11,381	11,338	11,807	3	2	3	3

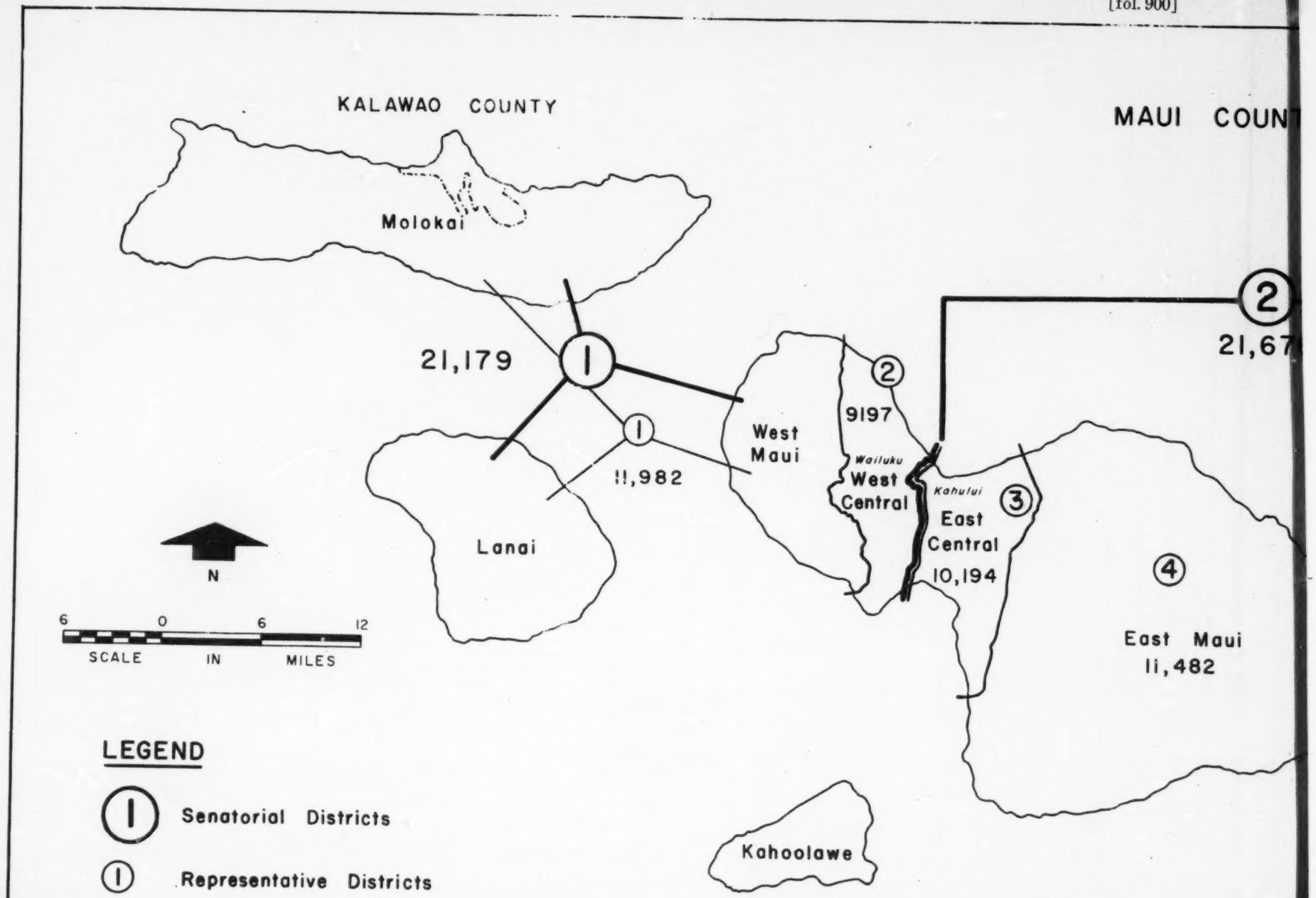
Source: Department of Planning and Economic Development, State of Hawaii, July 28, 1964.

* Based on 1960 Federal Census.

** From Office of the Lieutenant Governor, State of Hawaii. Instances when apportionment based on registered voters differ from that based on population are indicated by underscoring.

In the United States District Court
For the District of Hawaii
Plaintiffs' Exhibit 6

[fol. 900]



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DEPARTMENT OF PLANNING & ECONOMIC DEVELOPMENT

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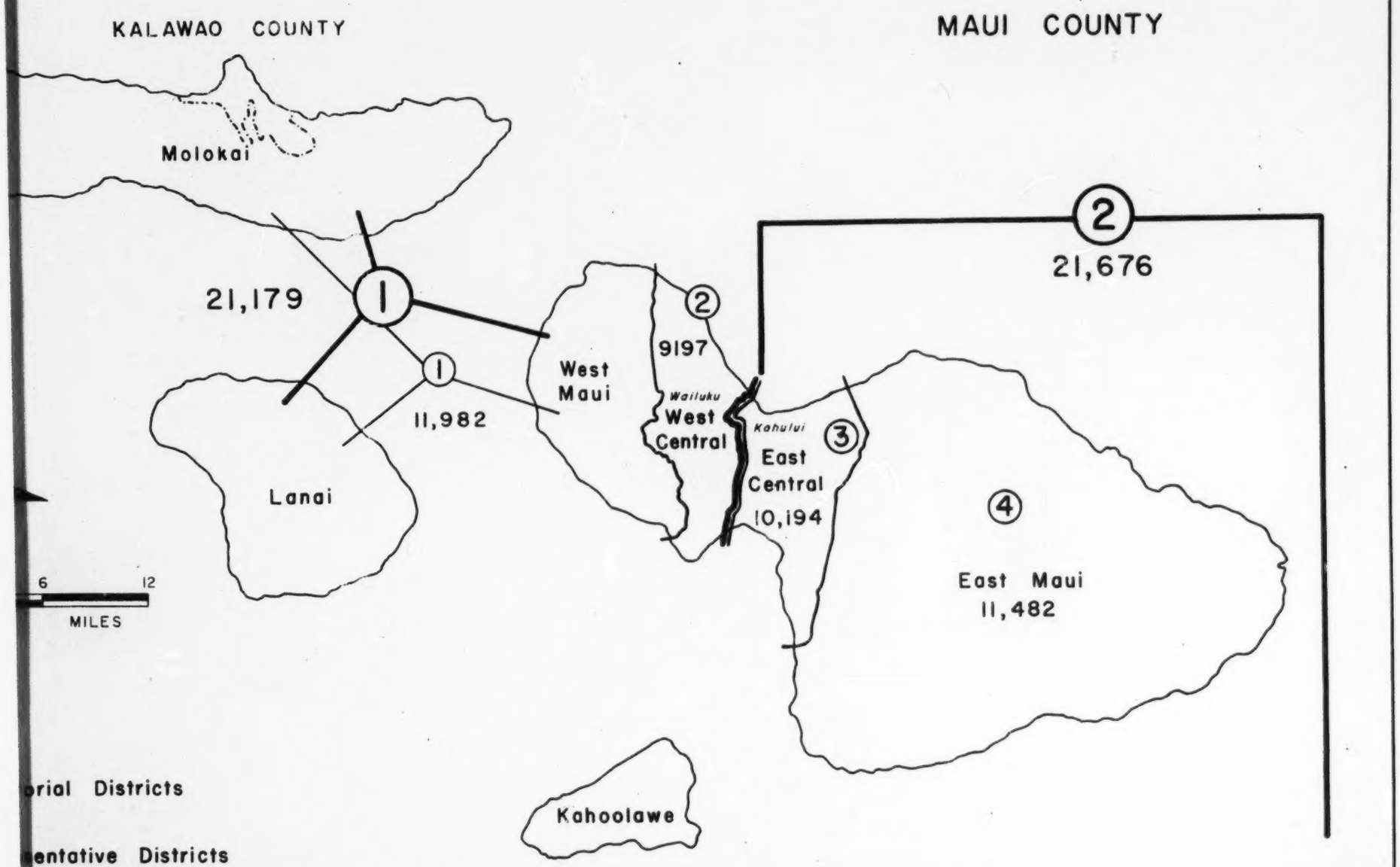

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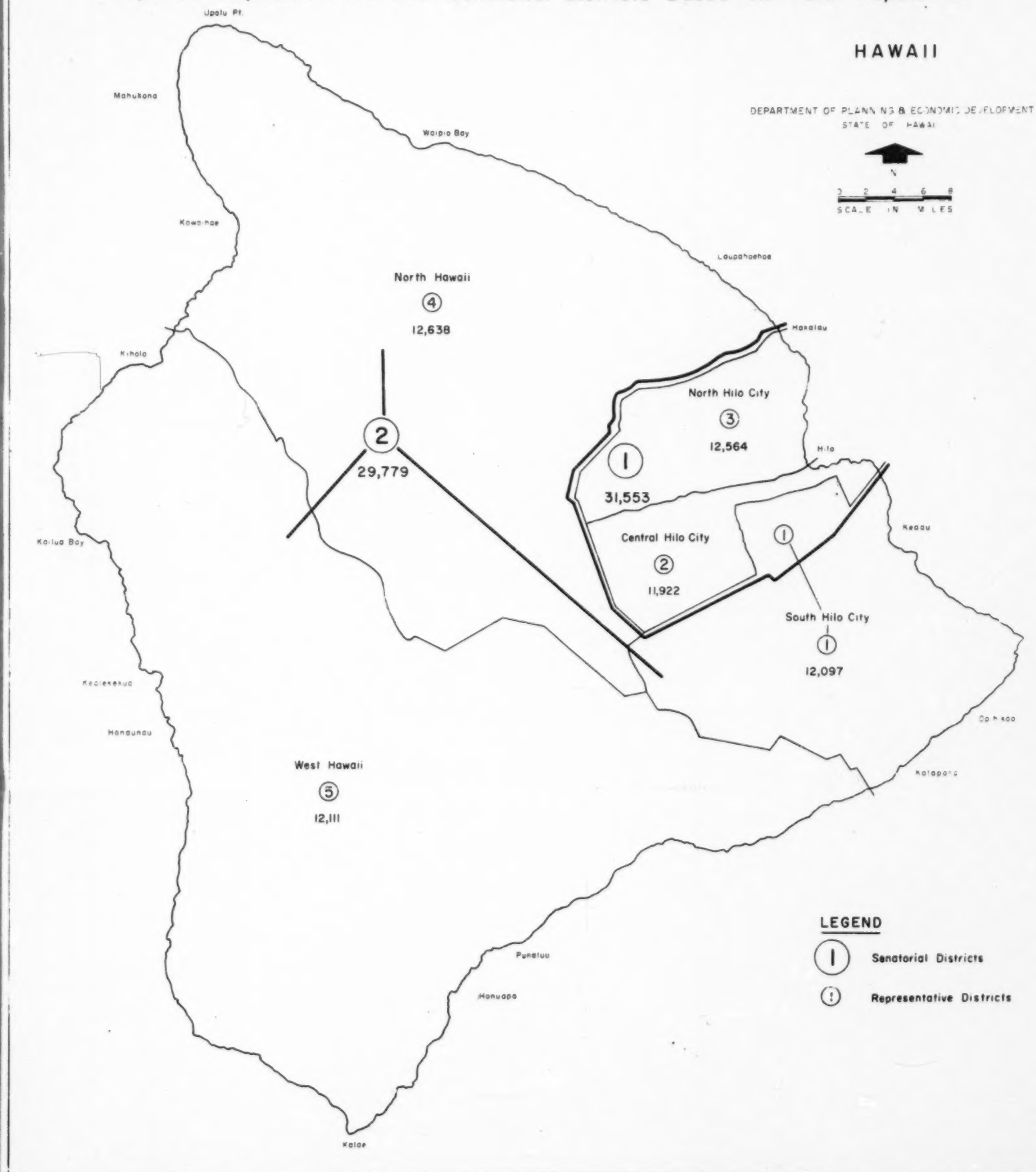
STATE OF HAWAII

In the United States District Court
For the District of Hawaii

Plaintiffs' Exhibit 7

Proposed Representative and Senatorial Districts Based on Total Population

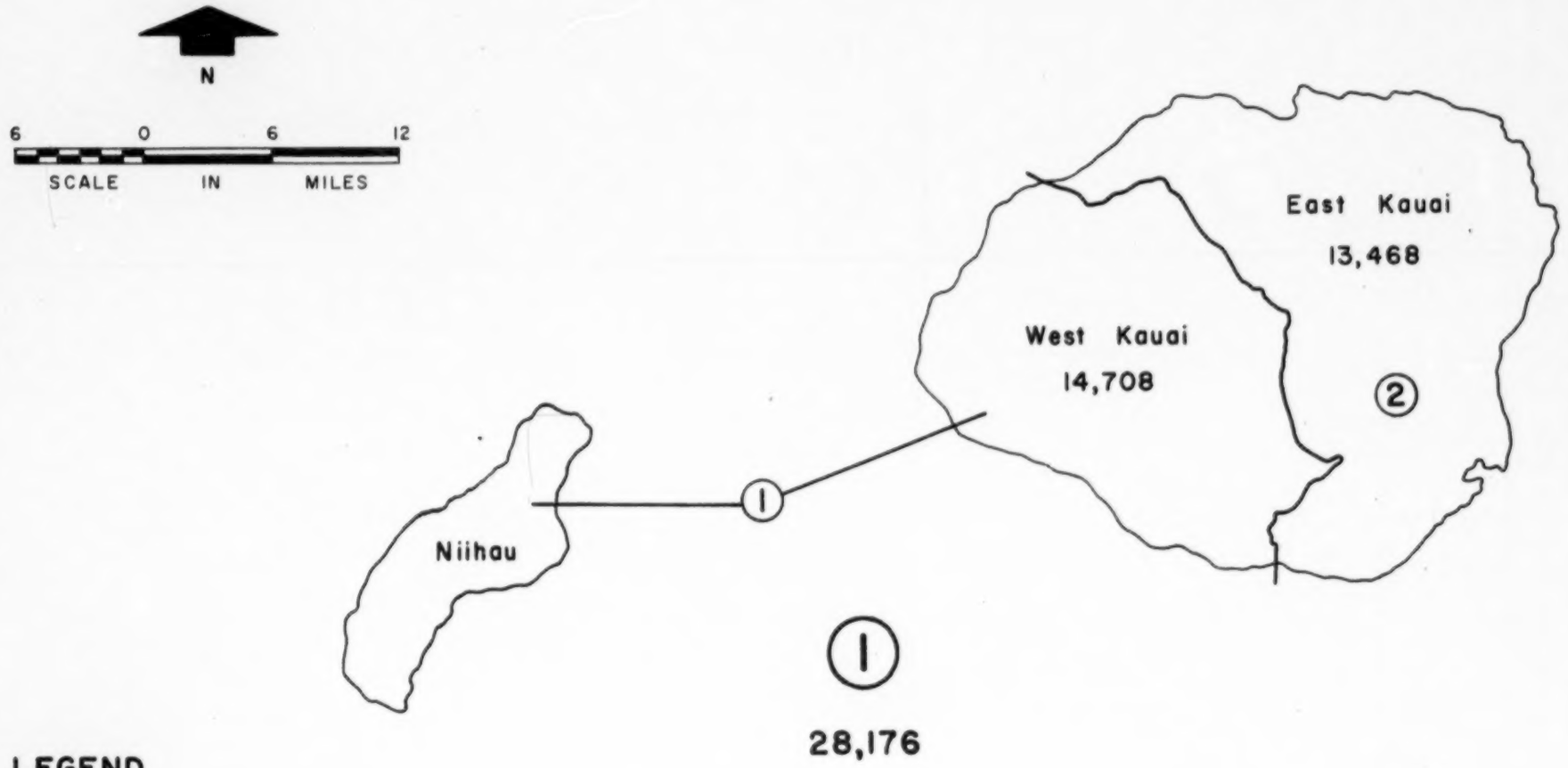


[fol. 901]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

PLAINTIFFS' EXHIBIT 9

KAUAI COUNTY



LEGEND

(1) Senatorial District

(1) Representative Districts

Proposed Representative and Senatorial Districts Based on Total Po

DEPARTMENT OF PLANNING & ECONOMIC DEVELOPMENT STA

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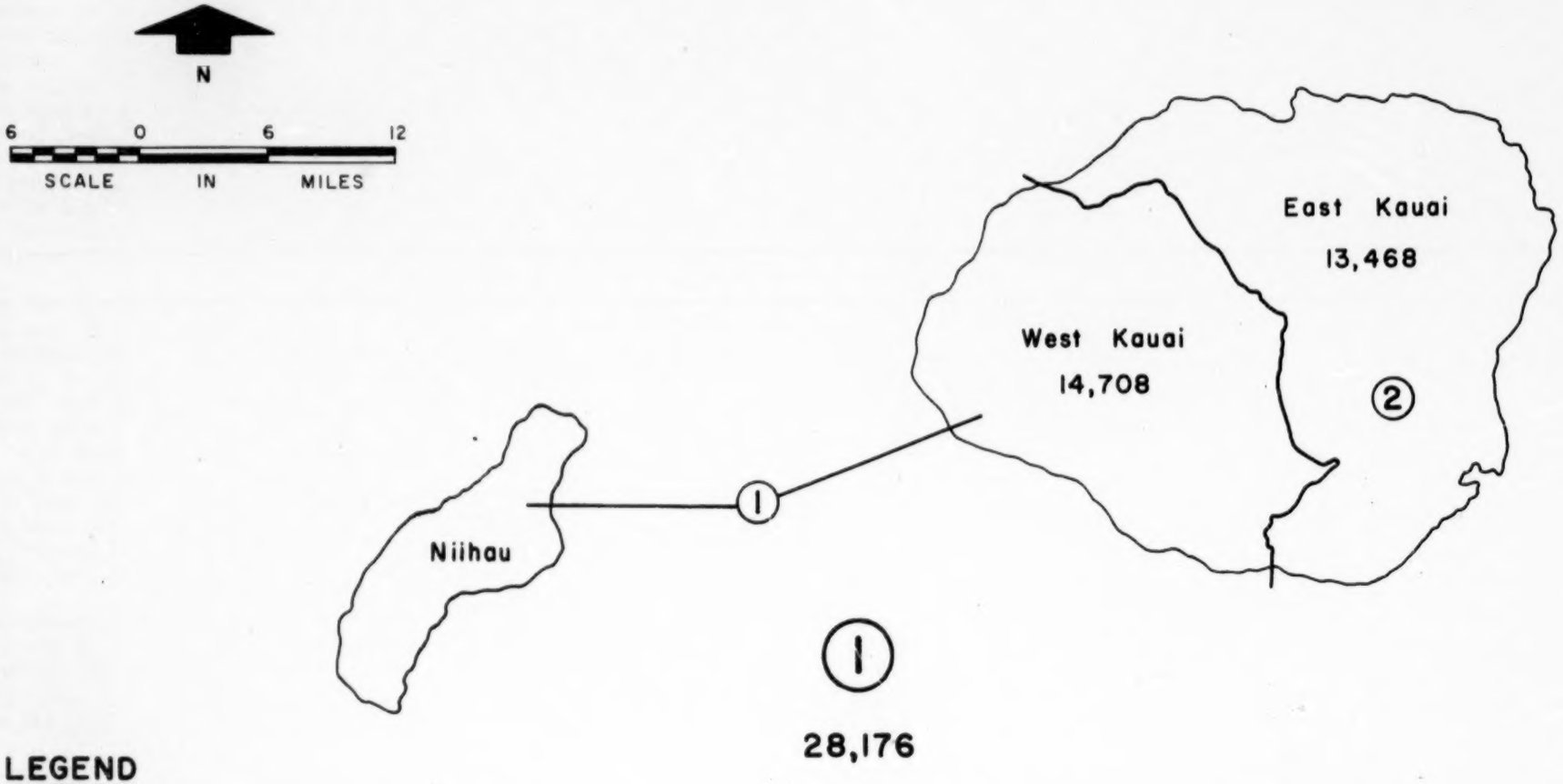
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

PLAINTIFFS' EXHIBIT 9

KAUAI COUNTY



LEGEND

(1) Senatorial District

(1) Representative Districts

posed Representative and Senatorial Districts Based on Total Population

TMENT OF PLANNING & ECONOMIC DEVELOPMENT

STATE OF HAWAII

[fol. 903]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

PLAINTIFFS' EXHIBIT 11

Standing Committee Report No. 92

Your Committee on Legislative Powers and Functions submits herewith a committee proposal for a complete article on legislative powers and functions. The proposal embodies what your Committee believes necessary or desirable in establishing the legislative department of the state government. Before arriving at its proposal your Committee studed the several proposals referred to it, as well as those provisions of the Hawaiian Organic Act, the Model State Constitution and the constitutions of several of the states pertaining to the legislature. Your Committee has decided to retain the framework provided in the Organic Act without substantial change, except in a few particulars.

Your Committee believes that the legislature should remain bicameral, but recognizing the desirability of wider representation of the population, which has greatly increased since the adoption of the Organic Act, has provided for an increase in the membership of both houses of the legislature. However, while it was unanimously agreed that there should be an increase in membership, your Committee was unable to agree as to the extent of the increase. A majority of your Committee approved a senate of 25 members and a house of representatives of 51 members, while a minority insisted that the house should not be larger than 41 members nor the senate larger than 21 members.

[fol. 904] In fixing the composition of the two houses your Committee was faced with the problem of reapportionment, which, with the increase and shift of population since 1900, has become complicated as well as acute. Your committee has agreed that the house of representatives

must be apportioned on the basis of the number of registered voters among the several major island divisions (the present counties) but that the present ratio of representation among the four existing senatorial districts should be maintained in the senate. In districting your Committee made but one change as to senatorial districts, that being the splitting of the island of Oahu into two districts roughly corresponding to the present representative districts, but completely revised the representative districts, which are increased from six to eighteen.

A major departure proposed by your Committee from the provisions of the Organic Act is the provision for annual, as distinguished from biennial, sessions of the legislature. Your committee proposes that of the annual regular sessions, only those held in the odd numbered years, which shall be known as "general sessions," shall be open to all kinds of legislation and that those held in the even numbered years, to be known as "budget sessions," shall be confined to the general appropriations bill and bills to authorize proposed capital improvement expenditures, revenue bills necessary therefor, bills to provide for the expenses of such session, urgency measures deemed necessary in the public interest, bills calling elections and [fol. 905] proposed constitutional amendments. In addition, special sessions are provided for.

The provision for annual sessions is a recognition of the need today for more frequent, if not continuous, sessions of the legislature, particularly in view of the difficulties of projecting estimate of revenues and expenses for two years and more in advance, as is the case at present. The provision for a budget session in those years in which a general session is not held, makes it possible to limit appropriations for the expenses of the government to a single fiscal year.

A similar thought underlies your Committee's action in providing for the establishment of a legislative council. While such a provision might be considered legislative and the inclusion of such provision objected to on that

ground, your Committee believes that the work of the legislature must be implemented by a continuous study by some agency under the control of the legislature in the interim between sessions and that it is a matter of such importance that it should not be left entirely to legislation.

Another important change is in the provision for reapportionment. The provision of the Organic Act for reapportionment has been, as is notorious, totally ineffective. Your Committee proposes that reapportionment be practically automatic every ten years.

Following is a summary of each of the several sections of the proposed article, with some comment.

[fol. 906] Section 1. Legislative powers. Section 1 vests the legislative power in the legislature, which is to consist of a senate and a house of representatives. The legislative power is extended to "all rightful subjects of legislation not inconsistent with the constitution of this state or the constitution of the United States," which phrase is intended as the broadest possible grant. Unlike section 55 of the Organic Act, from the first sentence of which said phrase is derived, and the constitutions of many of the states, the restrictions on the legislative power are not to be found in this article but, if at all, in other parts of the constitution.

Section 2. Senate; senatorial districts; number of members. Section 2 fixes the membership of the senate, delineates the several senatorial districts and fixes the number of senators to be elected from each. The senatorial districts, with the exception of those on the island of Oahu, are the same as now exist for the Territory. Oahu has been divided into two senatorial districts, the boundaries of which are the same as the boundaries for the present fourth and fifth representative districts except that all of windward Oahu is included in the old fifth representative district. Your Committee contemplates no automatic reapportionment of the senate. These districts and the members to be elected from each district will therefore remain until changed by constitutional amendment.

[fol. 907] The Committee proposal increases the membership of the senate from its present 15 to 25. Early in the deliberations of your committee on the question of the composition of each house of the legislature, there was unanimous agreement that the house of representatives should be apportioned according to some fixed principle, and that the senate was to be apportioned on some other basis. The majority of the members of the Committee felt that the present size of the senate, 15 members, was too small. There was general agreement that it should be larger. There was, however, no unanimity as to the exact size that it should be.

The proposed membership of 25 was arrived at by an agreement that the same proportion of Oahu members to neighbor island members be continued. With six members at present being elected from Oahu out of a total senate membership of 15, that proportion today is forty per cent for Oahu as against sixty per cent for the neighbor islands. By selecting a senate of 25 members, that proportion remains unchanged.

This was not the only size for the senate that was considered. The Committee discussed retaining the present 15 member senate, a senate of 19 members, a senate of 20 members with the Lieutenant Governor as its presiding officer, a senate of 21 members and a senate of 23 members. The 20 member senate, while it would have retained the present 40-60 proportion, was rejected as placing legislative authority and responsibility in the Lieutenant Governor, a member of the executive department. Some of [fol. 908] the members felt it inadvisable to go beyond a senate of 21 members, with a distribution of nine for Oahu and twelve for the neighbor islands. However, because this distribution would have given Oahu slightly more than forty per cent of the total senate, a majority of your committee voted to reject this plan. The retention of a 15 member senate was vigorously proposed by some members, but was rejected by a majority of the committee members.

The division of the island of Oahu into two senatorial districts was agreed upon, although not unanimously, in an effort to limit the area that would have to be covered in campaigns and to reduce campaign expenses. The inclusion of the Kailua and Waimanalo areas in the old fifth representative district follows a pattern set by the election districts for the election of Oahu delegates to this convention.

Section 3. House of representatives; representative districts; number of members; apportionment. Section 3 fixes the number of members of the house of representatives. It further describes the 18 representative districts from which the members of the house will be elected. As the descriptions of some districts are necessarily long, they will be included in the schedule of the constitution, but are nevertheless to be considered as a part thereof. The number of members to which each of these districts will be entitled until reapportionment is based on the number of voters registered in each district in 1950.

[fol. 909] From a very early point in your Committee's deliberation on the question of apportionment and reapportionment of the house of representatives, your Committee was unanimous in its decision to apportion the members among the several major island divisions on a realistic basis and in accordance with the principle that representation should be as nearly uniform as possible.

One of the reasons why the reapportionment directed by the Organic Act was not carried out was because that Act required reapportionment on the basis of citizen population. A breakdown of the population according to this standard has not been locally available. Total population figures for the Territory are shown by census tracts which do not necessarily coincide with locally defined areas. As a practical matter, the number of registered voters was found to bear a reliable and fairly uniform relationship to total population, although it favors slightly the neighbor islands where the percentage of persons who have registered to vote is from one to two per cent higher than for

Oahu. It was in recognition of the potential difficulty in obtaining figures which would show citizen population or figures which would show total population by desirable districts, that the basis for apportionment of the members of the house was chosen as the number of registered voters.

A majority of the members of your Committee was of the opinion that the present representation enjoyed by the neighbor islands should not, at least for the present time, [fol. 910] be decreased. With a 51-member house, apportioned equally among the several major island units, the present representation is maintained, although the representation for the island of Oahu is increased from twelve members to 33 members.

The cost to the state of a Legislature, with a 51-member house and a 25-member senate, was discussed at some length by your committee incident to the question of having biennial or annual sessions of the legislature. Some of the members of the committee felt that this larger size would, on a cost basis, make it inadvisable to provide for annual sessions; however, the majority of the members of the committee felt that the state could afford to have both a large legislature and annual sessions.

Section 4. Reapportionment of the house of representatives; mandamus. Some history of the reapportionment problem in the Territory may be outlined here. Under the 1894 Constitution of the Republic of Hawaii, the house of representatives consisted of 15 members, as did the other house. There is no positive proof that the apportionment of the members of the house was on a straight population basis; however, the very high correlation between the number of members from each major island division and the total population of those divisions, as shown by the 1890 census, indicates that total population was probably the standard used. The drafters of the Organic Act, in recognizing that a 15-member house was too small for effective [fol. 911] work, increased the membership to 30. This was done by merely doubling the number of representatives from each representative district. The drafters further

provided that, upon the completion of the next decennial census, and from time to time thereafter, both the house and the senate should be reapportioned by the legislature in accordance with citizen population. It is, of course, well known that this was not done by any succeeding legislature. The reapportionment problem has thus been aggravated by inaction over the years and the inequalities in the representation of the major island divisions have become more and more pronounced. By adopting, as the committee has done unanimously, the principle of uniform representation with periodic reapportionment to meet changing conditions, your committee sincerely feels that the problem has been finally solved. Where there was disagreement in the committee, it was on the total membership of the house and not upon the method of reapportionment.

Section 4 sets out the methods and the procedure for automatic reapportionment, and involves two steps, both of which have been spelled out. Step one is to take the total number of members of the house and to apportion those members among the four major island divisions (which have been defined as "basic areas") on the basis of the number of registered voters in each division. Step two is to take the number of representatives to which each basic area is entitled and to further apportion those members among the several representative districts within each basic [fol. 912] area as those districts are defined in Section 3. This second apportionment is also based on the number of registered voters. The result of this procedure is to achieve what is deemed to be the most equitable distribution of members among the several representative districts. The mathematical process, known as "the method of equal proportions," is the identical method used in apportioning the members of the United States house of representatives among the several states (55 Stat. 761-2; 2 U.S.C.A., 2a, 2b) and has been proven by expert mathematicians to result in the least possible discrimination.

The initial apportionment, as set out in Section 3, maintains the present neighbor island representation in the

house. However, there is no guarantee that upon reapportionment any area or district will continue to be entitled to elect the same number of representatives. Should the number of registered voters in any district, for example, drop in proportion to the number of registered voters in the State as a whole, the number of representatives to which that district would be entitled would be proportionately less.

It was not deemed advisable by your Committee to provide for complete redistricting of the State at the time of each reapportionment. To obviate the necessity for periodic redistricting, representative districts were fixed in such manner that it appears highly improbable that any district in the next few decades will not be entitled, on the basis of registered voters, to elect at least one representative. [fol. 913] Should, however, the number of registered voters fall below the number which would logically entitle it to elect a representative, provision is made for the redistricting of the basic area within which such a district lies. Maps showing the boundaries of these districts have been filed with the convention secretary.

The duty for effecting reapportionment and such redistricting as might be necessary has been placed on the Governor. In order to assure that this duty, which is of a ministerial nature, will actually be carried out, the Governor has been made specifically subject to mandamus by the Supreme Court. This is the only way in which a constitution can guarantee reapportionment and is consequently the method considered by this committee to be the most desirable.

[fol. 914] Section 5. Election of members; term of office. Section 5 provides for the election of members of the legislature at general elections and fixes the term of office of members of the house of representatives at two years and that of members of the senate at four years.

Section 6. Vacancies. Section 6 provides that vacancies in the legislature shall be filled for the unexpired term in

such manner as may be prescribed by law, but if no such provision is made, then by appointment by the governor for the unexpired term. This is a change from the Organic Act (sections 31 and 37), which required vacancies to be filled by election.

Section 7. Qualifications of members. Section 7 states the qualifications for members of the senate and the house of representatives. The requirements are the same as in the Organic Act (sections 34 and 40), namely, (1) attainment of the age of 30 years in case of senators and 25 years in case of members of the house, (2) residence in the State for not less than three years and (3) a requirement that the person be a qualified voter of the district, senatorial or representative, as the case may be, from which he seeks to be elected. The requirement of American citizenship is, of course, implied in the third requirement.

Section 8. Disqualification of public officers and employees. Section 8, which is derived from but somewhat broader than section 17 of the Organic Act, disqualifies any person while holding any public office, position or employment from being elected to or from taking or holding a seat in the legislature, the difference being that the proposed section applies to persons holding public positions or employment as well as public offices. It is not to be construed, [fol. 915] however, to prevent a member of the legislature from being re-elected or to prevent a member of either house from being elected to the other.

Section 9. Privileges of members. Section 9 sets forth the privileges of members of the legislature. The immunity from liability of members of the legislature has been enlarged to include "any statement made or action taken" in the exercise of legislative functions, as compared to section 28 of the Organic Act, which limits the immunity to "words uttered." The proposed section is intended to cover written as well as oral statements and any action taken in the exercise of legislative functions, in the broadest sense.

The provision for exemption from arrest is the same as contained in section 29 of the Organic Act, except that the ten-day limitation on going to and returning from sessions has been omitted.

Section 10. Disqualification of members. Section 10 disqualifies members of the legislature (1) from holding any other public office, position or employment of profit while holding their legislative office and (2) during the term for which they are elected or appointed, from being elected or appointed to any public office, position or employment of profit which is created, or the emoluments whereof are increased, by legislative act during such term. The first disqualification corresponds to a similar disqualification in the judiciary article. The second disqualification is derived from section 16 of the Organic Act but the Organic Act disqualification applies only to "any office of the Territory." [fol. 916] The provision under consideration is different in that (1) the disqualification of a member applies to a position or employment, as well as an office, of profit of the State or any local government or any agency thereof, but (2) on the other hand, it will apply only to an office, position or employment of profit that has been created, or the emoluments whereof increased, by the legislature during the term for which such member was elected or appointed.

[fol. 917] Section 11. Salary of members. Section 11 fixes the salary of members of the legislature as follows: $1,500 for each general session, $1,000 for each budget session and $750 for each special session of the legislature. No salary is to be payable when the senate alone is convened in special session. The salaries are to be payable in such installments as may be prescribed by law. The term "salary" has been used advisedly. While the legislature will have no authority to change the amount of the salaries fixed in this section, it is not intended to preclude the legislature from providing for the payment of per diem allowances and al-

lowances for or reimbursement of travel and other expenses.

Section 12. Sessions of legislature. Section 12 provides for regular sessions to be held annually, as well as special sessions of the legislature or of the senate alone. As briefly stated above, the annual sessions are to be "general sessions" and "budget sessions" in alternate years. The budget sessions are to be limited to the consideration and enactment of the general appropriations bill for the succeeding fiscal year and bills to authorize proposed capital expenditures, revenue bills necessary therefor, urgency measures deemed necessary in the public interest, bills calling elections, proposed constitutional amendments and bills to provide for the expenses of such session. Special limitations are imposed with respect to urgency measures, first, that each urgency measure must contain in a separate section a statement of the facts constituting the urgency, and, second, that no such measure may be considered by either house until such section is first approved by each house. [fol. 918] Furthermore, in the approval of such section and upon the final passage of the measure in each house, a two-thirds vote of all the members to which such house is entitled is required. The term "approval," as used in this respect, is not intended to require anything more than a single reading and vote, as distinguished from the passage of the measure itself, which will require three readings. The time for the commencement of regular sessions has been fixed at 10:00 o'clock a.m., on the third Wednesday in February, the date being the same as provided in section 41 of the Organic Act. General sessions are limited to 60 days, while budget sessions and special sessions are limited to 30 days, but the governor is authorized to extend any session for not more than 30 days. Sundays and holidays do not count in computing the number of days in any session.

Section 13. Adjournments. Section 13, which is substantially the same as section 42 of the Organic Act, simply

provides that neither house may adjourn for more than three days, or sine die, without the consent of the other.

Section 14. Organization; seating and punishment of members; officers; rules; journal; record of vote. Section 14 includes a number of provisions contained in several sections of the Organic Act. The provision that each house shall be the judge of the elections, returns and qualifications of its own members is the same as section 15 of the Organic Act. The provision that each house shall have power to punish any member for misconduct, disorderly behavior, or neglect of duty is derived from section 27 of the Organic Act. The grounds for punishment have been [fol. 919] enlarged to include misconduct, which term is to be taken in its broadest sense. Punishment may be by censure or by suspension or expulsion, but a two-thirds vote of all the members to which the house is entitled is required for suspension or expulsion. The provision that each house shall choose its own officers, determine the rules of its proceedings and keep a journal is substantially the same as section 20 of the Organic Act. The provision that the vote on any question shall be entered upon the journal at the request of one-fifth of the members present is the same as section 21 of the Organic Act.

[fol. 920] Section 15. Quorum; number required to act; compulsory attendance. Section 15 is also taken from several sections of the Organic Act. The requirement of a majority of the number of members to which each house is entitled for a quorum for the conduct of ordinary business, that of a majority of such quorum for action on ordinary business, and the requirement of a majority vote of all the members to which each house is entitled for the final passage of a bill are the same as in section 22 of the Organic Act. The provision for the taking of the vote by ayes and noes and the entry thereof in the journal upon the final passage of a bill is taken from section 46 of the Organic Act. The provision that a smaller number than a quorum may adjourn from day to day and may compel the atten-

dance of absent members is the same as section 23 of the Organic Act.

Section 16. Bills; enactment by bill; subject and title; enacting clause. Section 16 contains one new provision, to wit, that no law shall be passed except by bill. This provision would eliminate the practice of legislating by joint resolutions. This section further requires that each law shall embrace but one subject, which is required to be expressed in its title, as is provided by section 45 of the Organic Act. The description of the enacting clause of laws is substantially the same as that specified in section 44 of the Organic Act.

Section 17. Passage of bills. Section 17 sets forth the requirement of passage on three readings in each house on separate days for any bill to become law, as is provided in section 46 of the Organic Act. The provision for certification of bills from one house to the other upon passage is [fol. 921] the same as in section 47 of the Organic Act.

Section 18. Action by governor; approval; veto; failure to approve or veto. Section 18 is derived from sections 49 and 51 of the Organic Act, both of which relate to action on a bill by the governor after passage by the legislature and certification and presentation thereof to him. A bill becomes law upon approval by the governor, which is indicated by his signing the same. A bill is vetoed by the governor if he returns it, with his objections, to the legislature. The veto power, in the case of any bill appropriating money for specific purposes, is applicable to any specific item or items and may be exercised by striking out or reducing the same, but as to other bills the veto must be of the bill as a whole. Such provisions are the same as the provisions of the Organic Act, except the provision for reduction of specific items as stated above. If any bill is neither signed nor returned by the governor within ten days, Sundays and holidays excepted, after it has been presented to him, it becomes law unless the legislature by adjournment pre-

vents its return, in which case it does not become law. This provision is in substance the same as the second paragraph of section 51 of the Organic Act, except that holidays as well as Sundays are to be excluded in computing the ten day period.

Section 19. Procedure upon veto. Section 19 sets forth the procedure upon veto and is substantially the same as section 50 of the Organic Act. The requirement of a two-thirds vote of all the members to which each house is entitled for the over-riding of the governor's veto is retained.

[fol. 922] Section 20. Punishment of persons not members. Section 20 provides for the summary punishment of persons not members of the legislature for contempt of either house or any committee thereof, the punishment therefor being limited to a fine of not more than $100 or imprisonment for not more than 30 days. The parallel section in the Organic Act is section 25, but there are substantial differences. The proposed section is intended as a declaration of the inherent power of the legislature to punish for contempt, but is not intended to prevent the legislature from enacting legislation to provide for judicial proceedings as an alternative method of vindicating the authority of the legislature, with such penalties as may be provided by such law.

Section 21. Impeachment of elective executive officers. Section 21 provides for the impeachment of the governor and other elective officers of the executive department of the State, as distinguished from the judicial and the legislative branches. Grounds for impeachment are limited to treason, bribery and other high crimes and misdemeanors. The power to impeach is vested in the house of representatives but the power to try all impeachments is vested in the senate. The chief justice presides in case the governor is being tried. Conviction requires concurrence of two-thirds of the members present and judgments upon conviction are limited to removal from office and disqualification

from holding office. Conviction upon impeachment, however, does not preclude further prosecution and punishment according to law. The foregoing provisions are patterned after the provisions of the Federal Constitution on this subject.

[fol. 923] Section 22. Legislative council; duties; salary. Section 22 establishes a legislative council, to be composed of such members of the legislature as may be provided by law. The duties of the council are to collect information concerning the government and general welfare of the State and to report thereon to the legislature, to study and report on such measures for proposed legislation as may be submitted to it and such other duties as may be assigned by law. The council is authorized to recommend such legislation as in its opinion the welfare of the State may require. Members of the council may receive, in addition to their salary as legislators, such salary as may be provided by law.

In conclusion, your Committee believes that this proposal provides a suitable structure for the legislative branch of the State government that has been, in the main, proved by our experience under the Organic Act. Your Committee therefore recommends that this Committee proposal pass on second reading, subject, however to such amendments as may be made thereto.—June 23, 1950

Wm. H. Heen,
Chairman
E. B. Holroyde,
Vice-Chairman
Edward C. Bryan
Randolph Crossley
Hiram L. Fong
Flora K. Hayes
Frederick Ohrt
Thos. T. Sakakihara
Arthur D. Woolaway

Herbert K. H. Lee and Wm. H. Heen—We do not concur as to those portions of Sections 2 and 3 of the proposal which fix the total membership of the senate and house of representatives, and, unless such mem-
[fol. 924] bership is reduced, we do not concur in the

provision for annual sessions contained in Section 12.

Elizabeth R. Kellerman and Cable A. Wirtz—We do not concur with sections 2 and 3.

Toshio ~~Serizawa~~—I do not concur with section 2.

Peter Kawahara—I do not concur with sections 2 and 3.

Vol. I, Proceedings of the Constitutional Convention of Hawaii, pp. 249-253

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

PLAINTIFFS' EXHIBIT 14

DEPARTMENT OF PLANNING AND ECONOMIC DEVELOPMENT
STATE OF HAWAII
HONOLULU, HAWAII 96813

Statistical Report 22 October 15, 1964

ELECTION STATISTICS OF HAWAII

This report presents statistics on the number of persons eligible to register to vote for Hawaii elections, the number and characteristics of registered voters, the number of votes cast, apportionment of the State Legislature (both current and proposed), and party membership of State and County officials.

Trend data are shown from 1900 forward. Hawaii was annexed to the United States in 1898 and granted a Territorial form of government two years later. Statehood was formally achieved on August 19, 1959.

Local government is vested in one combined city and county, three predominantly rural counties, and one quasi county administered by the State Department of Health. There are no incorporated cities or towns.

Additional information appears in Guide to Government in Hawaii (Second Edition, 1963), published by the Legislative Reference Bureau of the University of Hawaii, and in reports of the Office of the Lieutenant Governor.

This summary was prepared by the Statistics Branch of the Department of Planning and Economic Development. Many of the tables were compiled to update the section on "Elections" in the Statistical Abstract of Hawaii, 1962. Others were developed at the request of the Governor and State Legislature to assist in reapportionment of the Legislature. Apportionment was computed by the "Method of Equal Proportions," as recommended by the Advisory Committee to the Director of the Census and the National Academy of Sciences and described in U.S. Senate Document No. 304, 76th Congress, 3d Session (1940). The same method is specified in the Hawaii State Constitution (Art. III, Sect. 4).

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[fol. 926]

Table 1.--POPULATION AND REGISTERED VOTERS, FOR HAWAII: 1902 TO 1962

Year	Civilian population, July 1	Registered voters, Nov.	Per cent of pop. registered	Year	Civilian population, July 1	Registered voters, Nov. 1/	Per cent of pop. registered
1902 2/...	157,100	12,612	8.0	1934	366,700	71,168	19.4
1904 2/...	167,600	13,253	7.9	1936	376,600	75,059	19.9
1906 2/...	166,400	13,578	8.2	1938	388,800	83,312	21.4
1908	182,000	13,274	7.3	1940	397,405	87,312	22.0
1910	191,300	14,442	7.5	1942	446,119	85,292	19.1
1912	200,900	15,185	7.6	1944	464,250	84,326	18.2
1914	217,800	17,699	8.1	1946	470,153	103,180	21.9
1916	228,600	18,981	8.3	1948	491,146	123,616	25.2
1918	241,700	20,124	8.3	1950	472,780	141,319	29.9
1920	254,500	26,335	10.3	1952	462,494	148,717	32.2
1922 2/...	271,500	32,491	12.0	1954	474,391	160,865	33.9
1924 2/...	294,800	34,739	11.8	1956	512,200	170,258	33.2
1926	316,100	40,569	12.8	1958	555,222	175,317	31.6
1928	336,400	46,058	13.7	1959	568,661	183 118	32.2
1930	354,100	52,149	14.7	1960	590,650	202,059	34.2
1932	368,900	63,831	17.3	1962	635,888	221,650	34.9

1/ Except for 1959 (July 28).

2/ Registered voter total differs from that reported in Report of the Governor of Hawaii to the Secretary of the Interior, 1901-1937: 13,449 in 1904, 13,577 in 1906, 28,806 in 1922 and 29,717 in 1924.

Source: Office of the Lieutenant Governor, records; Hawaii Department of Economic Development, Intercensal Population Estimates for Hawaii, 1848-1963 (June 3, 1963), pp. 7-8.

[fol. 927]

Table 2.--POPULATION AND REGISTERED VOTERS, FOR HAWAII, BY COUNTY: 1900 TO 1962

County and year	Total population 1/	Registered voters 2/	Per cent of population registered
All counties:			
1900	154,001	11,218	7.3
1910	191,874	14,442	7.5
1920	255,881	26,335	10.3
1930	368,300	52,149	14.2
1940	422,770	87,312	20.7
1950	499,794	141,319	28.3
1960	632,772	202,059	31.9
1962	682,682	221,650	32.5
City and County of Honolulu:			
1900	58,504	5,704	9.7
1910	81,993	7,555	9.2
1920	123,496	14,667	11.9
1930	202,887	32,511	16.0
1940	257,696	50,370	19.5
1950	353,020	93,353	26.4
1960	500,409	147,123	29.4
1962	549,081	164,324	29.9
Other counties:			
1900	95,497	5,514	5.8
1910	109,881	6,887	6.3
1920	132,385	11,668	8.8
1930	165,413	19,638	11.9
1940	165,074	36,942	22.4
1950	146,774	47,966	32.7
1960	132,363	54,936	41.5
1962	133,601	57,326	42.9

1/ As of June 1, 1900; April 15, 1910; January 1, 1920; April 1, 1930 to 1960; and July 1, 1962.

2/ For general elections held in November. The 1900 total refers to 1901.

Source: U.S. Bureau of the Census, various bulletins; Office of the Lieutenant Governor, records; Hawaii Department of Planning and Economic Development, preliminary 1962 population estimates.

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Table 3.--POPULATION, APRIL 1960, AND REGISTERED VOTERS, NOVEMBER 1960, FOR HAWAII, BY LEGISLATIVE DISTRICT

District	Population	Registered voters	Per cent of pop. registered
The State	632,772	202,059	31.9
SENATE			
First	44,297	19,266	43.5
Second	17,035	6,793	39.9
Third	42,855	17,539	40.9
Fourth	182,307	73,981	40.6
Fifth	318,102	73,142	23.0
Sixth	28,176	11,338	40.2
HOUSE			
First	5,030	2,257	44.9
Second	31,553	14,036	44.5
Third	7,714	2,973	38.5
Fourth	11,369	4,073	35.8
Fifth	5,666	2,720	48.0
Sixth	7,138	2,574	36.1
Seventh	35,717	14,965	41.9
Eighth	68,281	18,369	26.9
Ninth	42,816	7,410	17.3
Tenth	95,118	17,003	17.9
Eleventh	57,743	12,553	21.7
Twelveth	25,552	10,000	39.1
Thirteenth	28,592	7,807	27.3
Fourteenth	42,476	16,056	37.8
Fifteenth	60,125	25,869	43.0
Sixteenth	42,750	16,176	37.8
Seventeenth	36,956	15,880	43.0
Eighteenth	28,176	11,338	40.2

Source: U.S. Census of Population, 1960; Office of the Lieutenant Governor.

[fol. 929]

Table 4.--TOTAL POPULATION, CITIZENS OF VOTING AGE, AND REGISTERED VOTERS, FOR HAWAII: 1900 TO 1960

Year 1/	Total population	U.S. citizens of voting age 2/		Registered voters		
		Number	Per cent of popul.	Number	Per cent of popul.	Per cent of citizens
1900	154,001	14,263	9.3	11,218	7.3	78.7
1910	191,874	20,748	10.8	14,442	7.5	69.6
1920	255,881	62,683	24.5	26,335	10.3	42.0
1930	368,300	130,411	35.4	52,149	14.2	40.0
1940	422,770	186,027	44.0	87,312	20.7	46.9
1950	499,794	223,615	44.7	141,319	28.3	63.2
1960	632,772	312,478	49.4	202,059	31.9	64.7

1/ Total population and U.S. citizen data as of June 1, 1900, April 15, 1910, January 1, 1920, and April 1, 1930 to 1960; registered voters as of November 1901 (not 1900) and 1910 through 1960.

2/ Includes a small number of persons on outlying islands not under Territorial jurisdiction, 1910-1940. Limited to male U.S. citizens 21 and over, 1900 and 1910; all U.S. citizens 21 and over, 1920-1950; and all U.S. citizens 20 and over, 1960. In 1950, Territorial citizens (U.S. citizens with over one year of residence in Hawaii, exclusive of armed forces and their dependents) 21 and over numbered 189,616.

Source: U.S. Bureau of the Census, 12th Census ... 1900, Vol. I, Part I, p. 976; 13th Census ... 1910, Abstract of the Census, p. 581; 15th Census ... 1930, Outlying Territories and Possessions, p. 53; 16th Census ... 1940, Population, Second Series, Hawaii, pp. 6-8; U.S. Census of Population: 1950, Bulletin P-C52, table 32; and U.S. Census of Population: 1960, Vol. I, Part 13, tables 1, 16, and 97. U.S. Department of Justice, Immigration and Naturalization Service, records. Office of the Lieutenant Governor, records. The 1960 estimate of U.S. citizens of voting age was based on total population 20 and over, the number of aliens reported to the U.S. Department of Justice, and the age distribution of the foreign born population.

Table 5.--POPULATION 20 YEARS OF AGE OR MORE, POPULATION ELIGIBLE TO REGISTER, AND REGISTERED VOTERS, BY SEX, FOR HAWAII, BY COUNTY: 1960

Sex and county	Population 20 and over (April 1)	Eligible to register (April 1) 1/		Registered voters (Nov. 8) 2/		
		Number	Per cent of 20 and over	Number	Per cent of 20 and over	Per cent of eligible
Both sexes						
The State	360,193	231,914	64.4	202,059	56.1	87.1
Hawaii	34,594	25,481	73.7	26,059	75.3	102.3
Honolulu	284,901	177,642	62.4	147,123	51.6	82.8
Kauai	16,351	11,220	68.6	11,338	69.3	101.1
Maui and Kalawao .	24,347	17,571	72.2	17,539	72.0	99.8
Males						
The State	196,431	111,229	56.6	104,591	53.2	94.0
Hawaii	19,111	12,978	67.9	13,478	70.5	103.9
Honolulu	154,622	83,598	54.1	75,863	49.1	90.7
Kauai	9,336	5,860	62.8	5,983	64.1	102.1
Maui and Kalawao .	13,362	8,793	65.8	9,267	69.4	105.4
Females						
The State	163,762	120,685	73.7	97,468	59.5	80.8
Hawaii	15,483	12,503	80.8	12,581	81.3	100.6
Honolulu	130,279	94,044	72.2	71,260	54.7	75.8
Kauai	7,015	5,360	76.4	5,355	76.3	99.9
Maui and Kalawao .	10,985	8,778	79.9	8,272	75.3	94.2

1/ Under the State Constitution, all U.S. citizens 20 years of age or more, residents of Hawaii at least one year, and able to speak, read and write English or Hawaiian are qualified to register. Persons who are non compos mentis or convicted of a felony (unless pardoned) are disqualified. No person is deemed to have gained or lost residence simply because of his presence or absence while employed in the service of the United States, or while engaged in navigation, or while attending school.

2/ Includes persons who voted in the preceding general election but who may have subsequently died or moved away.

Source follows table 6.

[fol. 931]

Table 6.--PERSONS 20 YEARS OLD OR MORE NOT ELIGIBLE TO REGISTER, BY GROUP AND SEX, FOR HAWAII, BY COUNTY: 1960

Sex and county	All major groups	Not U.S. citizens	Residents less than 1 year 1/	In mental or penal institution	Military personnel	Military dependents
Total	128,279	51,316	8,529	2,190	45,082	21,162
Males						
Hawaii	6,133	5,735	287	-	111	-
Honolulu	71,024	21,708	3,700	1,429	44,187	-
Kauai	3,476	3,218	140	-	118	-
Maui and Kalawao ..	4,569	4,336	200	-	33	-
Females						
Hawaii	2,980	2,674	232	-	2	72
Honolulu	36,235	10,122	3,700	761	629	21,023
Kauai	1,655	1,501	105	-	2	47
Maui and Kalawao ..	2,207	2,022	165	-	-	20

1/ Civilian non-institutional only.

Source of tables 5 and 6: Robert C. Schmitt, Characteristics of Voters and Non-Voters in Hawaii (University of Hawaii, Romanzo Adams Social Research Laboratory, Report No. 31, November 1961).

Table 7.--ESTIMATED NUMBER OF PERSONS ELIGIBLE TO REGISTER TO VOTE IN HAWAII ELECTIONS: JULY 1, 1964

Group	Number
Resident population, including military personnel	720,600
Eligible to register to vote	283,400
Residents	270,000
Former residents, away at school	2,900
Former residents, in armed forces	10,500
Ineligible residents under 20 years old	310,600
Ineligible residents 20 years old and over	140,000
Aliens	47,600
Inmates of penal or mental institutions	4,600
Military personnel 1/	51,000
Military dependents 1/	24,700
Residents less than one year (civ. only)	12,100

1/ All military personnel and dependents assumed to be registered in other states or otherwise ineligible. In October 1962, military personnel and dependents who were 20 years of age or more, had one year or more of residence in Hawaii, and were living off base numbered 11,400 (including 5,900 servicemen and 5,500 dependents).

Source: Estimated by Statistics Branch, Hawaii Department of Planning and Economic Development, from data supplied by the U.S. Bureau of Census, U.S. Immigration and Naturalization Service, local commanding offices of the armed forces, Hawaii Department of Health, and Honolulu Redevelopment Agency.

[fol. 933]

Table 8.--REGISTERED VOTERS IN HOUSEHOLDS, FOR THE ISLANDS OF OAHU AND HAWAII: JANUARY 1961

Number of registered voters in household	Island of Oahu		Island of Hawaii	
	Number	Per cent	Number	Per cent
All households	124,000	100.0	15,800	100.0
No registered voters	31,700	25.6	1,000	6.2
1 registered voter	19,300	15.6	1,900	12.0
2 registered voters	61,700	49.7	10,200	64.3
3 registered voters	7,800	6.3	1,900	12.2
4 registered voters	2,700	2.2	600	3.6
5 or more registered	800	0.7	200	1.2
Registered voters per household	1.46	...	1.99	...

Source follows table 9.

Table 9.--CHARACTERISTICS OF THE HOUSEHOLD POPULATION 18 AND OVER, BY VOTING REGISTRATION, THE ISLANDS OF OAHU AND HAWAII: JANUARY 1961

Subject	Island of Oahu				Island of Hawaii			
	Per cent distribution			Per cent registered 1/	Per cent distribution			Per cent registered 1/
	Total	Registered	Not registered		Total	Registered	Not registered	
Pop. 18 and over ..	100.0	100.0	100.0	62.6	100.0	100.0	100.0	81.7
Residence:								
Major city 2/	65.0	70.5	55.9	67.8	34.3	36.4	25.2	86.5
Other	35.0	29.5	44.1	52.8	65.7	63.6	74.8	79.1
Race: 3/								
Caucasian	40.1	29.6	57.6	46.2	23.6	24.7	18.7	85.5
Chinese	11.7	15.0	6.1	80.4	2.8	3.3	0.2	98.4
Filipino	5.8	5.7	6.0	61.4	11.8	9.4	22.6	64.9
Hawaiian	5.7	6.9	3.7	75.7	10.1	11.2	5.0	91.0
Japanese	32.6	38.0	23.5	73.0	48.0	48.4	46.3	82.4
Other	4.1	4.7	3.2	71.5	3.8	3.0	7.2	65.1
Highest school grade: 3/								
8th or less	13.4	15.8	9.3	73.9	36.6	34.3	46.5	76.7
9th to 12th	52.7	52.7	52.7	62.5	48.0	51.3	33.4	87.3
13th or more	32.8	30.8	36.2	58.7	14.4	13.9	17.0	78.5
Not reported	1.2	0.8	1.8	42.8	1.0	0.5	3.2	...
Occupation: 3/								
Professional, tech. .	11.5	13.9	7.3	76.1	8.4	9.5	3.7	91.9
Farmers, farm mgrs. .	0.6	0.5	0.7	75.9	8.9	8.9	8.7	82.1
Mgrs., officials, prop.	13.7	16.8	8.5		12.0	12.3	10.7	83.7
Clerical workers	9.4	12.0	5.0	79.9	6.0	6.2	5.0	84.7
Sales workers	4.6	5.8	2.6	78.8	3.7	4.0	2.5	87.7
Military personnel ..	17.1	25.9	55.8	43.7	17.4	18.5	12.7	86.6
Craftsmen, foremen ..	20.0							
Operatives	9.8	11.5	7.0	73.4	18.6	18.1	21.1	79.2
Service workers	5.1	5.3	4.7	65.4	4.4	5.0	2.0	91.8
Farm laborers	0.2	0.2	0.2	57.1	5.1	4.3	8.5	69.4
Laborers, exc. farm .	3.0	2.8	3.5		6.0	5.7	7.2	78.0
Not employed	4.9	5.1	4.6	64.7	9.6	7.7	17.9	65.7
Occ. not reported ...	0.1	0.2	-	...	-	-	-	-

(Continued on next page.)

[fol. 935]

le 9.--CHARACTERISTICS OF THE HOUSEHOLD POPULATION 18 AND OVER, BY VOTING REGISTRATION, FOR THE ISLANDS OF OAHU AND HAWAII: JANUARY 1961--Cont.

Subject	Island of Oahu				Island of Hawaii			
	Per cent distribution				Per cent distribution			
	Total	Registered	Not registered	Per cent registered 1/	Total	Registered	Not registered	Per cent registered 1/
ly income:								
ss than $4,000 ...	15.1	10.6	22.7	43.8	34.6	31.3	49.0	74.0
,000 to $4,999 ...	12.6	10.3	16.5	51.1	16.4	16.4	16.4	81.7
,000 to $6,999 ...	26.6	26.9	26.1	63.3	24.0	24.9	20.4	84.5
,000 to $9,999 ...	23.5	26.0	19.3	69.3	13.5	14.4	9.2	87.5
,000 to $14,999 .	16.1	18.6	11.8	72.4	8.7	9.9	3.0	93.7
,000 or more	6.1	7.5	3.6	77.7	2.8	3.0	2.0	87.1

1/ Not shown separately where base (unexpanded) is less than 50.

2/ Honolulu (on Oahu) or Hilo (on Hawaii).

3/ Refers to head of household.

Source of tables 8 and 9: Robert C. Schmitt, Characteristics of Voters and Non-Voters Hawaii (University of Hawaii, Romanzo Adams Social Research Laboratory, Report No. 31, mber 1961).

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[fol. 936]

Table 10.--REGISTERED VOTERS BY PARTICIPATION IN GENERAL ELECTIONS, FOR HAWAII: 1958 TO 19

General election and Senatorial district	Registered voters	Number voting in general election	Per cent voting
1958, all districts	175,317	154,293	88.0
1959, all districts	183,118	171,383	93.6
1960, all districts	202,059	188,206	93.1
1962, all districts	221,650	200,441	90.4
First District	20,053	18,594	92.7
Second District	7,141	6,560	91.9
Third District	18,325	16,658	90.9
Fourth District	80,490	72,059	89.5
Fifth District	83,834	75,669	90.3
Sixth District	11,807	10,901	92.3

Source: Official Tabulation Results of Votes Cast - General Elections of November 4, 1958; July 28, 1959; November 8, 1960; November 6, 1962.

Table 11.--REGISTERED VOTERS, BY SEX, FOR HAWAII, BY COUNTY: 1960 AND 1962

County	November 8, 1960			November 6, 1962		
	Total	Male	Female	Total	Male	Female
The State	202,059	104,591	97,468	221,650	114,291	107,359
Hawaii	26,059	13,478	12,581	27,194	14,048	13,146
Honolulu	147,123	75,863	71,260	164,324	84,320	80,004
Kauai	11,338	5,983	5,355	11,807	6,242	5,565
Maui and Kalawao	17,539	9,267	8,272	18,325	9,681	8,644

Source: Office of the County Clerk, each county.

[fol. 937]

Table 12.--POPULATION, 1960, AND REGISTERED VOTERS, 1958 TO 1962, FOR HAWAII, BY COUNTY

County	Population, 1960			Reg. voters, general election		
	Total	Civilian	In civilian areas	1958	1960	1962
The State	632,772	585,505	561,100	175,317	202,059	221,650
Honolulu County	500,409	453,582	429,076	121,647	147,123	164,324
Other counties	132,363	131,923	132,024	53,670	54,936	57,326
Hawaii	61,332	61,079	61,105	25,534	26,059	27,194
Maui (incl. Kalawao) ...	42,855	42,810	42,839	16,755	17,539	18,325
Kauai	28,176	28,034	28,080	11,381	11,338	11,807

Source: 1960 U.S. Census; Office of the Lieutenant Governor.

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Table 13.--APPORTIONMENT OF HAWAII STATE LEGISLATURE, BY COUNTY, UNDER VARIOUS BASES

Body and county	Current basis	Reapportioned on basis of population			Reapportioned on basis of registered voters		
		Total	Civilian	In civilian areas	1958 election	1960 election	1962 election
SENATE							
Honolulu County	10	20	19	19	17	18	19
Other counties	15	5	6	6	8	7	6
Hawaii	7	2	3	3	4	3	3
Maui (incl. Kalawao) ...	5	2	2	2	2	2	2
Kauai	3	1	1	1	2	2	1
HOUSE OF REPRESENTATIVES							
Honolulu County	36	40	40	38	36	37	38
Other counties	15	11	11	13	15	14	13
Hawaii	7	5	5	6	7	7	6
Maui (incl. Kalawao) ...	5	4	4	4	5	4	4
Kauai	3	2	2	3	3	3	3

Source: Computed by "Method of Equal Proportions" from table 12.

[fol. 939]

Table 14.--REAPPORTIONMENT OF HAWAII STATE LEGISLATURE, BY SIZE, BASED ON TOTAL 1960 POPULATION

Size of body	City and County of Honolulu	Other counties			
		Total	Hawaii	Maui and Kalawao	Kauai
.....	16	4	2	1	1
.....	17	4	2	1	1
.....	17	5	2	2	1
.....	18	5	2	2	1
.....	19	5	2	2	1
.....	20	5	2	2	1
.....	20	6	3	2	1
.....	21	6	3	2	1
.....	22	6	3	2	1
.....	23	6	3	2	1
.....	24	6	3	2	1
.....	25	6	3	2	1
.....	25	7	3	2	2
.....	26	7	3	2	2
.....	27	7	3	2	2
.....	28	7	3	2	2
.....	28	8	4	2	2
.....	29	8	4	2	2
.....	29	9	4	3	2
.....	30	9	4	3	2
.....	31	9	4	3	2
.....	32	9	4	3	2
.....	33	9	4	3	2
.....	34	9	4	3	2
.....	35	9	4	3	2
.....	36	9	4	3	2
.....	36	10	5	3	2
.....	37	10	5	3	2
.....	38	10	5	3	2
.....	39	10	5	3	2

Continued on next page.

Table 14.--REAPPORTIONMENT OF HAWAII STATE LEGISLATURE, BY SIZE, BASED ON TOTAL 1960 POPULATION--Cont.

Size of body	City and County of Honolulu	Other counties			
		Total	Hawaii	Maui and Kalawao	Kauai
50	40	10	5	3	2
51	40	11	5	4	2
52	41	11	5	4	2
53	42	11	5	4	2
54	43	11	5	4	2
55	44	11	5	4	2
56	44	12	5	4	3
57	45	12	5	4	3
58	45	13	6	4	3
59	46	13	6	4	3
60	47	13	6	4	3
61	48	13	6	4	3
62	49	13	6	4	3
63	50	13	6	4	3
64	51	13	6	4	3
65	52	13	6	4	3
66	52	14	6	5	3
67	53	14	6	5	3
68	53	15	7	5	3
69	54	15	7	5	3
70	55	15	7	5	3
71	56	15	7	5	3
72	57	15	7	5	3
73	58	15	7	5	3
74	59	15	7	5	3
75	60	15	7	5	3
76	61	15	7	5	3
77	61	16	8	5	3
78	62	16	8	5	3
79	62	17	8	5	4
80	63	17	8	5	4

Source: Computed by "Method of Equal Proportions" from data in table 12.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

PLAINTIFFS' EXHIBIT 15

DEPARTMENT OF PLANNING AND ECONOMIC DEVELOPMENT
STATE OF HAWAII
HONOLULU, HAWAII 96813

November 6, 1964

CORRECTIONS

Statistical Report 20, "Military Personnel and Dependents in Hawaii, July 1964" (July 27, 1964).

The total number of military families in Hawaii as of July 1, 1964 was 21,631, not 19,631. The incorrect figure appears in the eighth line of page 1 and in table 1 (page 4), table 2 (page 5), and table 4 (page 7).

The number of military families on Oahu as of July 1, 1964 was 21,476, not 19,476, as reported in table 2, page 5.

The number of Navy families in the State as of July 1, 1964 was 6,803, not 4,803, as reported in table 2, page 5, and table 4, page 7.

The number of Navy families on Oahu was 6,746, not 4,746, as reported in table 3, page 6.

[fol. 942]

DEPARTMENT OF PLANNING AND ECONOMIC DEVELOPMENT
STATE OF HAWAII
HONOLULU, HAWAII 96813

Statistical Report 20

July 27, 1964

MILITARY PERSONNEL AND DEPENDENTS IN HAWAII, JULY 1964

The number of military personnel and dependents in Hawaii increased sharply between July 1, 1963 and July 1, 1964, according to information compiled by the Hawaii Department of Planning and Economic Development from the armed forces. The mid-1964 total was 128,930, compared with 125,602 six months earlier and 118,588 a year ago.

The new total includes 59,840 officers and enlisted men (47,959 stationed ashore and 11,881 aboard ships homeported in Hawaii) and 69,090 dependents domiciled in Hawaii. The number of military families was 19,631.

All branches of the armed forces were represented. Air force personnel and dependents numbered 25,113; Army, 35,769; Coast Guard, 3,108; Marine Corps, 21,135; and Navy, 43,805.

Most of the armed forces and dependents were on Oahu, which accounted for 128,095 of the total. Figures for other islands were: Hawaii, 341; Maui, 98; Kauai, 308; Molokai, 40; and outlying islands, 48. The latter group included 21 Coast Guard personnel on tiny (64-acre) French Frigate Shoal, 556 statute miles northwest of Honolulu, and 27 on Kure Island (one-third of a square mile), 1,367 statute miles northwest of Honolulu. Both French Frigate Shoal and Kure Island are legally part of the City and County of Honolulu. Johnston Island, with 145 Air Force and Coast Guard personnel, and the Midway Islands, with 2,402 Navy personnel and dependents, were excluded from this tabulation because they are not under State jurisdiction.

Recent figures on officers and enlisted men in Hawaii are well below wartime totals. The all-time high occurred in 1944, when 407,000 servicemen, including those aboard ships in Island ports, were reported in the Territory.

The armed forces account for a sizeable fraction of the State's population and labor force. At the beginning of 1964, 17.6 per cent of the resident population of the State (21.5 per cent for Oahu) were military personnel or dependents. About 26.5 per cent of all employed persons in the State (31.3 per cent on Oahu) were either military personnel or civilian employees of the armed forces.

Statistics on military families appear in these reports for the first time. A "military family" is defined as a family headed by a member of the armed forces. A family, in turn, is defined as two or more persons related by blood, marriage, or adoption and living together. A "military household," in contrast, consists of a

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ousehold (the occupants of a regular housing unit) headed by a member of the armed forces. A serviceman living alone in a house or apartment would be classified as a "military household" but not as a "military family."

Data on military families should be used with caution. The figures for earlier years are estimates made a few months ago by local commanding officers and their staffs from available information, some of which was incomplete or only approximate. The data for 1950 in particular are subject to estimating error. The 1950 total shown here (11,640 military families) differs significantly from the corresponding Census count of military households (7,709).[1] The 1960 total given here (19,631 military families), however, is much closer to the Census figure for the same date (19,442 families).[2] The erratic trend shown for the last twelve months is somewhat perplexing.[3]

An effort was also made to reconstruct 1950 data on military personnel and dependents. The rough estimates provided by local commanding officers indicated 29,404 members of the armed forces and 38,325 dependents for Hawaii in that year. The 1950 Census reported 22,856 officers and enlisted men for that date.[4] More recent discrepancies between official series have resulted chiefly from differences in definition and coverage.[5]

Census statistics on the population living on military bases in 1960 likewise appear here for the first time. These counts were provided by the Bureau of the Census at the request of Governor John A. Burns, for use in reapportionment of the State Legislature. Data for earlier years were published by the Honolulu Redevelopment Agency.[6]

Detailed information appears in the accompanying tables. A more extensive review of historical trends, including discussion of definitions and sources, may be found in earlier reports of this series.[7]

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[1] Unpublished U.S Census data cited in the Honolulu Redevelopment Agency, Redevelopment and Housing Research, No. 12, April 1958, p. 27.

[2] U.S. Census of Population: 1960, Final Report PC(1)-13D, table 146. Military households in 1960 numbered 19,700 (see the Hawaii Department of Planning and Research, Military Statistics for Hawaii, 1961-1962, Research Report 16, February 8, 1962, p. 7).

[3] For conflicting data from other sources, see the Honolulu Redevelopment Agency, Redevelopment and Housing Research, No. 23, July 1963, p. 14 (23,900 military households on Oahu in October 1962) and the Honolulu Advertiser, April 2, 1964 (26,850 "families here now").

[4] Quoted in present report, table 8.

[5] See present report, table 9. See also the Department of Defense report quoted in the Honolulu Star-Bulletin, June 11, 1964 (63,831 military dependents exclusive of Coast Guard).

[6] Totals are cited in the present report, table 7.

[7] The most recent was Military Personnel and Dependents in Hawaii, January 1964 (Statistical Report 14, February 15, 1964), which, on page 2, listed previous reports in this series as well as pertinent studies by the Honolulu Redevelopment Agency.

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The data in this study were compiled largely by the Statistics Branch of the Department of Planning and Economic Development from unclassified information supplied by the Air Force, Army, Coast Guard, Marine Corps, and Navy. 8/ The cooperation of the armed forces in making these data available is gratefully acknowledged.

8/ No separate statistics were compiled for the National Guard. For a discussion of the statistical treatment of National Guard members, see the letter from Major General F. W. McKinney quoted in the Hawaii Department of Planning and Research, Military Personnel and Dependents in Hawaii, July 1961 (Research Report 9, August 15, 1961), page 1, footnote 1.

[fol. 945]

Table 1.--MILITARY PERSONNEL, DEPENDENTS, AND FAMILIES, FOR HAWAII: 1950 TO 1964

(As estimated locally. For estimates from other sources, see tables 8 and 9 and text.)

Date	Personnel and dependents	Military personnel			Dependents in Hawaii 1/	Military families
		Total	Ashore	Aboard ship		
1964 July 1	128,930	59,840	47,959	11,881	69,090	19,631
January 1	125,602	59,626	48,242	11,384	65,976	23,025
1963 July 1	118,588	57,093	45,354	11,739	61,495	21,651
January 1	122,968	59,429	47,413	12,016	63,539	21,967
1962 July 1	122,933	59,702	48,020	11,682	63,231	21,973
January 1	121,464	59,487	47,402	12,085	61,977	21,281
1961 July 1	118,381	56,348	44,155	12,193	62,033	21,007
January 1	115,324	54,653	43,723	10,930	60,671	19,567
1960 April 1	112,938	52,881	41,927	10,954	60,057	19,631
1959 Spring	112,525	56,303	(NA)	(NA)	56,222	(NA)
1958 June 30	(NA)	(NA)	(NA)	(NA)	55,641	(NA)
1957 September 30	(NA)	(NA)	(NA)	(NA)	52,962	(NA)
1950 April 1	67,729	29,404	(NA)	(NA)	38,325	11,640

NA Not available.

1/ Data for 1957 and 1958 exclude a small number of dependents on islands other than Oahu. The Oahu count for June 30, 1959 was 55,618.

Source follows table 4.

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[fol. 946]

Table 2.--MILITARY PERSONNEL, DEPENDENTS, AND FAMILIES, BY SERVICE AND ISLAND, FOR HAWAII. JULY 1, 1964

Island and service	Personnel and dependents	Military personnel			Dependents in Hawaii 1/	Military families
		Total	Ashore	Aboard ship		
The State	128,930	59,840	47,959	11,881	69,090	19,631
By island: 1/						
Oahu	128,095	59,431	47,577	11,854	68,664	19,476
Hawaii	341	171	157	14	170	74
Maui	98	41	28	13	57	20
Kauai	308	131	131	-	177	53
Molokai	40	18	18	-	22	8
French Frigate Shoal	21	21	21	-	-	-
Kure	27	27	27	-	-	-
By service:						
Air Force	25,113	7,808	7,808	-	17,305	4,944
Army	35,769	19,000	19,000	-	16,769	5,800
Coast Guard	3,108	1,555	568	987	1,553	523
Marine Corps	21,135	10,450	10,446	4	10,685	3,561
Navy	43,805	21,027	10,137	10,890	22,778	4,803

1/ See table 3 for Johnston Island and the Midway Islands, not part of the State of Hawaii.

Source follows table 4.

[fol. 947]

ble 3.--MILITARY PERSONNEL, DEPENDENTS, AND FAMILIES, BY SERVICE, FOR HAWAII, BY ISLAND: JULY 1, 1964

Service and island	Personnel and dependents	Military personnel			Dependents in Hawaii	Military families
		Total	Ashore	Aboard ship		
AIR FORCE 1/						
hu	25,026	7,775	7,775	-	17,251	4,926
vaii	31	11	11	-	20	6
ui	56	22	22	-	34	12
ARMY						
u	35,589	18,915	18,915	-	16,674	5,773
aii	148	74	74	-	74	20
i	19	5	5	-	14	4
ai	5	4	4	-	1	1
okai	8	2	2	-	6	2
COAST GUARD 2/						
u	2,820	1,410	450	960	1,410	470
aii	106	49	35	14	57	28
i	23	14	1	13	9	4
ai	79	18	18	-	61	15
okai	32	16	16	-	16	6
nch Frigate Shoal	21	21	21	-	-	-
e	27	27	27	-	-	-
MARINE CORPS						
i	21,129	10,444	10,440	4	10,685	3,561
aii	6	6	6	-	-	-
NAVY 3/						
i	43,531	20,887	9,997	10,890	22,644	4,746
aii	50	31	31	-	19	20
ui	224	109	109	-	115	37

1/ Excludes 119 personnel on Johnston Island, not part of the State of Hawaii.

2/ Excludes 26 personnel on Johnston Island, not part of the State of Hawaii.

3/ Excludes 1,608 personnel and 794 dependents on the Midway Islands, not part of the e of Hawaii.

Source follows table 4.

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[fol. 948]

Table 4.--ARMED FORCES, DEPENDENTS, AND MILITARY FAMILIES, BY SERVICE, FOR HAWAII: 1950 TO 1964

Category and date	All branches	Air Force	Army	Coast Guard	Marine Corps	Navy
Armed forces: 1/						
Apr. 1, 1950 2/....	29,404	3,954	6,500	1,150	2,800	15,000
Apr. 1, 1960	52,881	6,089	15,500	1,393	29,934	
Jan. 1, 1961	54,653	6,699	16,159	1,486	30,309	
July 1, 1961	56,348	6,919	16,353	1,616	31,460	
Jan. 1, 1962	59,487	7,149	18,556	1,547	32,235	
July 1, 1962	59,702	7,416	18,439	1,510	32,337	
Jan. 1, 1963	59,429	7,384	17,440	1,365	10,154	23,086
July 1, 1963	57,093	7,646	17,000	1,519	10,327	20,601
Jan. 1, 1964	59,626	7,718	18,000	1,546	10,113	22,249
July 1, 1964	59,840	7,808	19,000	1,555	10,450	21,027
Dependents:						
Apr. 1, 1950 2/....	38,325	7,650	6,000	1,175	3,500	20,000
Apr. 1, 1960	60,057	11,769	17,431	1,496	8,808	20,553
Jan. 1, 1961	60,671	11,756	18,198	1,707	8,703	20,307
July 1, 1961	62,033	13,730	18,198	1,649	8,537	19,919
Jan. 1, 1962	61,977	12,251	20,650	1,502	8,272	19,302
July 1, 1962	63,294	14,006	20,135	1,582	8,252	19,256
Jan. 1, 1963	63,539	14,473	19,298	1,580	8,061	20,127
July 1, 1963	61,495	14,565	17,836	1,598	7,421	20,075
Jan. 1, 1964	65,976	17,519	16,121	1,568	10,983	19,785
July 1, 1964	69,090	17,305	16,769	1,553	10,685	22,778
Military families:						
Apr. 1, 1950 2/....	11,640	3,060	2,000	350	1,230	5,000
Apr. 1, 1960	19,631	4,708	5,447	420	2,340	6,716
Jan. 1, 1961	19,567	4,702	5,447	475	2,252	6,691
July 1, 1961	21,007	5,492	6,568	450	2,114	6,383
Jan. 1, 1962	21,281	4,900	7,700	430	1,893	6,358
July 1, 1962	21,973	5,602	7,701	440	1,877	6,353
Jan. 1, 1963	21,967	5,789	7,005	440	2,024	6,709
July 1, 1963	21,651	5,826	6,800	450	1,884	6,691
Jan. 1, 1964	23,025	7,008	6,300	430	2,692	6,595
July 1, 1964	19,631	4,944	5,800	523	3,561	4,803

1/ Includes armed forces stationed ashore or aboard ships homeported in Hawaii.

2/ Approximate.

Source of tables 1 to 4: Replies to questionnaires submitted to local commanding officers.

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ble 5.--POPULATION AND HOUSING UNITS IN MILITARY INSTALLATIONS IN HAWAII: APRIL 1, 1960

ncludes military bases, military housing areas, Coast Guard stations, and Navy and Coast Guard ships in Hawaii ports.)

County and installation	Enumeration district	Census tract	Population	Housing units
HONOLULU COUNTY				
akapuu Point Light Station	401-01	1	1	-
oko Crater Radar Station	401-02	1	-	-
ort Ruger Military Reservation	401-21	6	366	86
ort DeRussey Military Reservation	401-92	19	112	33
hips (2 vessels)	401-91	19	388	-
hips (13 vessels at Kapalama)	401-268	57	1,258	-
ort Shafter	401-304	66	1,839	297
ripler Hospital	401-305	67	1,138	167
dford Terrace and Halsey Terrace	401-311	69	1,619	937
analua Housing	401-312	70	4,264	1,300
val Housing Area 2	401-312	70	2,216	644
val Housing Area 3	401-313	71	3,363	1,042
eteran's Housing, U.S.N. Supply	401-314	71	683	136
eteran's Housing, Hickam	401-314	72	24	6
ickam Village	401-315	72	2,351	560
ickam Air Force Base	2-316	73	6,454	1,131
ort Kamehameha	2-316	73	1,248	301
val Housing Area 1 1/	2-317	74	5,825	562
mp H.M. Smith	2-320	75	172	12
d Hill Naval Reservation	2-321	75	42	10
nana Naval Housing and Storage Area	2-344	80	1,226	271
earl Harbor Peninsula Naval Housing	2-345	81	1,250	359
ord Island 2/	2-346	81	2,082	107
ipio Peninsula	2-346	82	131	27
rbor's Pt. Hsg. (Iroquois Pt.)	2-349	83	677	618
rbor's Pt. Naval Air Station	2-368	85	5,998	951
una Kapu Radio Station	2-361	86	-	-
nawahua Air Force Reservation	2-362	86	-	-
lailai Military Reservation	2-363	86	-	-
ort Barrette	2-364	86	-	-
rbor's Pt. Water Supply	2-364	86	-	-
.S. Government Reservation	2-365	86	-	-
.S.C. and G.S. Observatory	2-365	86	18	15
earl Harbor Naval Reservation	2-347	89	1,890	-
iawa Military Reservation	2-358	89	54	13
pper Kipapa Military Reservation	2-358	89	-	-
aikele Gulch Military Reservation	2-358	89	317	16
ower Kipapa Military Reservation	2-358	89	-	-

(Continued on next page.)

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Table 5. POPULATION AND HOUSING UNITS IN MILITARY INSTALLATIONS IN HAWAII: APRIL 1, 1960
Continued

County and installation	Enumeration district	Census tract	Population	Housing units
Waikakalaua Military Storage	2-358	89	-	-
Waipio Air Force Reservation	2-359	89	32	-
East Range Schofield Barracks	2-407	90	7	0
Wheeler Air Force Base	2-407	90	1,399	11
Wahiawa Radio Station Naval Reservation	2-392	91	625	253
Kawailoa Training Area	2-392	91	-	69
Schofield Barracks	2-408	95	14,873	-
Camp Andrews Naval Reservation	2-372	96	5	2,083
Lualualei Military Reservation	2-374	96	-	1
Puu Ohulu Kai Military Resevation	2-374	96	-	-
Maili Military Reservation	2-375	96	1	-
Lualualei-Maili Naval Radio Station	2-378	96	575	1
Waianae Kai Military Reservation	2-381	97	-	143
Keaau Military Reservation	2-383	98	-	39
Kaena Pt. Military Reservation (part)	2-383	98	-	-
Makua Military Training Area	2-384	99	-	-
Kaena Pt. Military Reservation (part)	2-384	99	-	-
Dillingham Air Force Base	2-384	99	3	-
Waialua Military Reservation	2-384	99	-	1
Kawailoa Military Reservation	2-390	100	-	-
Helemano Radio Station Military Reservation	2-390	100	325	-
Pupukea-O Military Reservation	2-409	101	-	32
Kahuku Training Area (part)	2-409	101	-	-
Punamano Radio Station	2-410	101	-	-
Kahuku Training Area (part)	2-410	101	-	-
Kokololio Military Reservation	2-412	102	-	-
Kahuku Training Area (part)	2-412	102	-	-
Waikane Air Force Training Area	2-416	103	-	-
Haiku Naval Radio Station	2-421	103	5	-
Heeia Naval Radio Station	2-423	105	-	1
Kapaa Training Area (part)	2-435	107	-	-
Kaneohe Marine Base	2-436	108	6,397	-
Kapaa Training Area (part)	2-437	109	-	969
Kapaa Training Area (part)	2-459	110	-	-
Bellows Field Air Force Base	2-460	113	65	-
French Frigate Shoal	2-465	114	15	8
				-
HAWAII COUNTY				
Kilauea Military Camp	1-33	...	126	25
Ships (2 vessels in Hilo Harbor)	1-3	...	101	-

(Continued on next page.)

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Table 5.--POPULATION AND HOUSING UNITS IN MILITARY INSTALLATIONS IN HAWAII: APRIL 1, 1960
Continued

County and installation	Enumeration district	Census tract	Population	Housing units
KALAWAO COUNTY				
Kalaupapa Light Station, Kalaupapa	3-IN	...	2	-
KAUAI COUNTY				
Barking Sands Military Reservation	4-21	...	70	1
Nawiliwili Light Station	4-4	...	3	-
Nawiliwili Point Light Station	4-23	...	9	-
(1 vessel at Nawiliwili)	4-4	...	14	-
MAUI COUNTY				
(1 vessel at Kahului)	5-30	...	14	-

1/ Includes 3,888 persons aboard 35 ships.

2/ Includes 1,345 persons aboard 12 ships.

Source: Unpublished tabulations from 1960 Census of Population, supplied by Bureau of the Census.

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Table 6.--POPULATION AND HOUSING UNITS IN MILITARY INSTALLATIONS IN HAWAII, BY COUNTY: APRIL 1, 1960

County	Population	Housing units
The State	71,672	13,238
Hawaii	227	25
Honolulu	71,333	13,212
Kalawao	2	-
Kauai	96	1
Maui	14	-

Source: Computed from present report, table 5.

Table 7.--POPULATION IN MILITARY INSTALLATIONS IN HAWAII: 1920 TO 1960

Year	Oahu	Year	The State	Oahu
1920	5,942	1950	40,991	40,928
1930	19,000	1960	71,672	71,333
1940	29,831			

Source: Honolulu Redevelopment Agency, "Available Statistics on the Military Population of Hawaii," Redevelopment and Housing Research, No. 5, July 1956, pp. 36-39; present report, table 6.

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Table 8.--SOLDIERS, SAILORS AND MARINES, 1900 TO 1940, AND ARMED FORCES, 1940 TO 1960, FOR THE STATE OF HAWAII

Date	Soldiers, sailors and marines 1/	Date	Armed forces
June 1, 1900	245	April 1, 1940	27,000
April 15, 1910	1,608	April 1, 1950	22,856
January 1, 1920	4,366	April 1, 1960	47,267
April 1, 1930	16,291		
April 1, 1940	26,233		

1/ Excludes commissioned officers, professional and clerical workers, and craftsmen. Data for 1940 include Coast Guards.

Source. 12th Census of the United States: 1900, Vol. II, Population, Part II, tables 92, 93 and 94, pp. 508, 513, and 567; 13th Census of the United States: 1910, Vol. IV, Population, Occupation Statistics, pp. 609-611; 14th Census of the United States: 1920, Vol. IV, Population, Occupations, table 21, p. 1275; 15th Census of the United States: 1930, Occupational Statistics, Hawaii, table 4; 16th Census of the United States: 1940, 2nd Series, Characteristics of the Population, Hawaii, table 13, p. 18; United States Census of Population: 1950, General Characteristics, Hawaii (Bulletin P-B52), tables 19 and 28; United States Census of Population: 1960, General Social and Economic Characteristics, Hawaii, Final Report PC (1)-13C, table 53. Cited in the Honolulu Redevelopment Agency, Redevelopment and Housing Research, No. 5, July 1956, p. 33.

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Table 9.--MEMBERS OF THE ARMED FORCES IN THE STATE OF HAWAII: 1939 TO 1964

(As estimated by the U.S. Bureau of the Census and U.S. Office of Business Economics. For locally prepared estimates, see table 1.)

Year	Census estimate 1/	OBE estimate 2/	Year	Census estimate 1/	OBE estimate 2/
1939	(NA)	23,502	1952	55,000	35,000
1940	30,000	28,230	1953	48,000	36,000
1941	48,000	44,278	1954	38,000	36,000
1942	136,000	117,155	1955	56,000	47,000
1943	200,000	206,014	1956	58,000	49,000
1944	407,000	378,322	1957	60,000	49,000
1945	355,000	300,328	1958	55,000	45,000
1946	65,000	67,818	1959	56,000	45,000
1947	38,000	33,667	1960	59,000	42,000
1948	33,000	30,035	1961	61,000	45,000
1949	31,000	25,603	1962	79,000	48,000
1950	21,000	21,000	1963	60,000	48,300
1951	44,000	32,000	1964	60,000	(NA)

NA Not available.

1/ As of July 1. Includes crews of ships in Hawaii ports on the estimate date.

2/ Monthly or quarterly averages for the year. Excludes crews of ships in Hawaii ports unless temporarily stationed ashore. Detailed descriptions of the OBE series and comparisons between the OBE and Census data appear in the Honolulu Redevelopment Agency, Redevelopment and Housing Research, No. 5, July 1956, pp. 31-39, and No. 14, December 1958, pp. 22-24 and 27.

Source: U.S. Bureau of the Census, Current Population Reports, Series P-25, No. 80 (October 7, 1953), No. 229 (May 22, 1961), and No. 289 (August 31, 1964). U.S. Office of Business Economics, Income of Hawaii (1953), table 4, p. 20. Letters from Robert E. Graham, Jr., U.S. Office of Business Economics, July 11, 1961, July 30, 1962, June 24, 1963, and May 14, 1964.

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Table 10 --POPULATION AND EMPLOYMENT, BY MILITARY STATUS, FOR HAWAII, BY COUNTY: JANUARY 1, 1964

Subject	Number			Per cent		
	The State	Honolulu County	Other counties	The State	Honolulu County	Other counties
POPULATION						
Total	714,092	580,800	133,292	100.0	100.0	100.0
itary personnel 1/	59,626	59,343	283	8.3	10.2	0.2
itary dependents	65,976	65,644	332	9.2	11.3	0.2
er civilians	588,490	455,813	132,677	82.4	78.5	99.5
EMPLOYMENT						
Total	296,123	249,604	46,519	100.0	100.0	100.0
itary personnel 1/	59,626	59,343	283	20.1	23.8	0.6
ilian employees of med forces 2/	18,798	18,758	40	6.3	7.5	0.1
er employed civilians 2/	217,699	171,503	46,196	73.5	68.7	99.3

1/ Includes personnel aboard ships homeported Hawaii.

2/ As of January 12, 1964.

Source: Hawaii Department of Planning and Economic Development, Military Personnel Dependents in Hawaii, January 1964 (Statistical Report 14, February 15, 1964), p. 3, The Population of Hawaii, January 1964 (Statistical Report 15, March 31, 1964), p. 6. ii Department of Labor and Industrial Relations, records.

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Table 11.--DEPARTMENT OF DEFENSE ACTIVE DUTY MILITARY PERSONNEL IN HAWAII: 1940 TO 1964

Year [1]	Shore based	Naval afloat [2]	Year [1]	Shore based	Naval afloat [2]
1940	27,665	...	1957	38,523	9,850
1943	194,300	...	1958	35,849	6,594
1944	442,160	...	1959	37,536	7,034
1945	322,372	...	1960	35,970	7,155
1946	58,837	...	1961	37,681	6,384
1947	34,900	...			
1948	29,662	...	1962: June 30	41,615	5,737
1949	22,553	...	Sept. 30	41,657	6,505
1950	19,408	...	Dec. 31	41,586	5,980
1951	27,603	7,588	1963: Mar. 31	40,031	6,471
1952	26,486	7,039	June 30	41,018	5,966
1953	24,785	8,595	Sept. 30	40,610	5,764
1954	21,669	7,131	Dec. 31	42,646	5,977
1955	39,611	6,623	1964: Mar. 31	44,649	6,007
1956	39,688	7,278			

Footnotes and source follow table 12.

Table 12.--DEPARTMENT OF DEFENSE MILITARY DEPENDENTS LOCATED IN HAWAII: 1954 TO 1964

Year [3]	Dependents	Year [3]	Dependents
1954: December 31	36,199	1960	62,608
1956: January 31	49,955	1961	63,172
1957: January 31	53,654	1962	63,889
1958	56,976	1963	66,425
1959	50,882	1964	68,138

[1] June 30 unless otherwise specified.

[2] Includes mobile activities temporarily based ashore. Not available for dates before 1951.

[3] March 31 unless otherwise specified.

Source of tables 11 and 12: Letter from Foster Adams, Director, Directorate for Statistical Services, Office of the Assistant Secretary of Defense, September 1, 1964.

[fol. 957]

In the United States District Court

For the District of Hawaii

Plaintiffs' Exhibit 16

...ble 1 -- POPULATION, BY CLASS, FOR HAWAII, BY LEGISLATIVE DISTRICT - 1960

District	Total Population	By Military Status		By Area	
		Armed Forces	Civilians	Military Bases	Civilian Areas
The State - -	632,772	47,267	585,505	71,672	561,100
...torial Districts:					
- - - - - - - - -	44,297	105	44,192	101	44,196
- - - - - - - - -	17,035	148	16,887	126	16,909
- - - - - - - - -	42,855	45	42,810	16	42,839
- - - - - - - - -	182,307	3,940	178,367	882	181,425
- - - - - - - - -	318,102	42,887	275,215	70,451	247,651
- - - - - - - - -	28,176	142	28,034	96	28,080
...sentative Districts:					
- - - - - - - - -	5,030	-	5,030	-	5,030
- - - - - - - - -	31,553	105	31,448	101	31,452
- - - - - - - - -	7,714	-	7,714	-	7,714
- - - - - - - - -	11,369	148	11,221	126	11,243
- - - - - - - - -	5,666	-	5,666	-	5,666
- - - - - - - - -	7,138	22	7,116	2	7,136
- - - - - - - - -	35,717	23	35,694	14	35,703
- - - - - - - - -	68,281	5,749	62,532	6,467	61,814
- - - - - - - - -	42,816	11,883	30,933	17,232	25,584
- - - - - - - - -	95,118	19,223	75,895	27,997	67,121
- - - - - - - - -	57,743	4,480	53,263	17,497	40,246
- - - - - - - - -	25,552	180	25,372	-	25,552
- - - - - - - - -	28,592	1,372	27,220	1,258	27,334
- - - - - - - - -	42,476	1,509	40,967	-	42,476
- - - - - - - - -	60,125	1,803	58,322	500	59,625
- - - - - - - - -	42,750	320	42,430	366	42,384
- - - - - - - - -	36,956	308	36,648	16	36,940
- - - - - - - - -	28,176	142	28,034	96	28,080

...urce: Estimated by Hawaii Department of Planning and Economic Development from data supplied by U. S. Bureau of the Census.

[fol. 958] FOR THE DISTRICT OF HAWAII

DEFENDANT'S EXHIBIT A

Testimony of Robert C. Schmitt, Statistician,
Department of Planning and Economic Development
before the State Senate
July 24, 1964

The purpose of this presentation is threefold: First, to review the various definitions of "population" suggested for use in reapportionment or accepted by State and Federal statistical agencies; second, to consider the availability of statistics for each definition of "population"; and finally, to indicate the number of legislators allotted to each county of the State under the various definitions.

A number of possible bases for reapportionment have been suggested: total population, civilian population, the population living in areas under civilian control, U.S. citizens, the population eligible to register to vote, and actual registered voters. Each of these will be considered.

Total population

Total population, as defined by the United States Bureau of the Census, consists of all persons who normally reside in a given geographic area. It includes military personnel stationed ashore in the area, ships' crews (both civilian and military) in ports of the area in question on the Census date, persons in transient accommodations (hotels, trailers, camps, etc., if they have no regular place of residence or are in the process of changing residence), local residents temporarily out of the State on business or vacation, students from other areas attending a local university, inmates of long-term institutions (mental hospitals, prisons, etc.) The total population excludes ships' crews that may be homeported in the area but temporarily in ports outside of the area, students from the area at schools outside of the area, tourists temporarily visiting the area, and inmates of short-term institutions (general hospitals, etc.) unless they live in the same area. A full statement appears in the "Enumerator's Reference Manual, 1960 Census of Population and Housing," published by the U.S. Bureau of the Census in 1959.

The 1960 population of Hawaii was 632,772, of which 500,409 was in the City and County of Honolulu. The latter figure included 40,345 armed forces ashore and 6,482 aboard Navy or Coast Guard ships in Pearl Harbor and Kapalama Basin. It also included 810 crew members of civilian ships, chiefly in Ala Wai Yacht Harbor, Honolulu Harbor, and Pearl Harbor. The Oahu count further included 3,869 inmates of institutions, such as State Hospital in Kaneohe (1,155), Waimano Home (825), and Oahu Prison (421).

The official U.S. Census is taken decennially, most recently as of April 1, 1960. Annually, as of July 1, the Bureau prepares estimates of (1) total and (2) civilian population by State. The Hawaii State Department of Planning and Economic Development issues semi-annual estimates of (1) resident and (2) de facto population, by military status, for the State and each island.

Geographic detail reported by the decennial census is considerable. Total population is published for the State, each county, each census tract on Oahu, each census county division on the neighbor islands (there are 114 census tracts and 37 census

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county divisions in the State), and each city block in Honolulu. For 1960, special tabulations were authorized (at local cost) for city blocks in Hilo, Wailuku, and Lahaina. Unpublished data are available for enumeration districts, small areas averaging 800 in population, throughout the State. Tabulations are not available for existing election districts or precincts, except in rare cases where the two have identical boundaries.

Civilian population

Civilian population excludes members of the armed forces but includes their dependents, civilian employees of the armed forces, and other civilian groups. It can be estimated from the 1960 Census by subtracting totals for military personnel from the population counts. Data on armed forces can be computed from labor force information included in the Census bulletins. They are reported for counties and census tracts but not census county divisions, blocks, or enumeration districts.

Three potential problems should be kept in mind when using data on armed forces from the 1960 Census:

1. They are not available (except at considerable cost for special tabulations) for many of the smaller areas for which total population can be obtained, such as enumeration districts and city blocks.

2. They were developed from a 25 per cent sample (the total population, in contrast, was taken from a full enumeration) and hence are subject to sampling variation.

3. The 1960 Census total of armed forces (47,267) differs markedly from the corresponding total reported by the Department of Defense to the Bureau of the Census (54,000) or by local commanding officers to the State Department of Planning and Economic Development (52,881). It is not known whether the difference resulted from error in the records of the armed forces, an undercount of military personnel in the Census, or misreporting of servicemen as civilians in the Census. The Bureau of the Census implicitly takes the latter position in its postcensal reports, adopting the published census figure for the total 1960 population and a civilian figure derived from the Department of Defense military count.

As noted earlier, the civilian population excludes members of the Air Force, Army, Coast Guard, Marine Corps, and Navy, but includes military dependents (except for WAC and WAVE personnel married to servicemen) and all civilian employees of the armed forces.

Semi-annual estimates of civilian de facto population, including visitors present but excluding absent residents, are published by the State Department of Health.

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Population of civilian areas

The population of civilian areas consists of all persons living on land not under military control. Each military base was classified as a "special enumeration district" for the 1960 U.S. Census. Unpublished population counts for these special enumeration districts can be obtained from the Bureau of the Census. Subtracting the population totals for these areas from the overall State figure leaves the population of civilian areas.

Census data indicate that persons living on military bases in Hawaii on April 1, 1960 numbered 71,672, with 71,333 on Oahu and 339 on other islands. These totals included armed forces in barracks, military families (both servicemen and dependents) in Wherry or Capehart Act housing areas, civilian employees of the armed forces domiciled in such areas, persons living in Coast Guard stations, and the officers and crews of Navy and Coast Guard ships in Hawaii ports on the Census date. Some of the more populous military bases were Schofield Barracks (14,873, including 6,264 civilians), Kaneohe Marine Corps Air Station (6,397, including 2,631 civilians), and Barbers Point Naval Air Station (5,998, including 2,722 civilians).

Some military areas are more civilian than military in character. The Navy owned 1,697 housing units on Oahu as of April 1, 1960 which were operated by the Hawaii Housing Authority and occupied in part by veterans, civilian employees of the armed forces, and other persons not classified as active military personnel.

American citizens

The number of American citizens living in Hawaii can be estimated by subtracting the 1960 figure on aliens compiled by the U.S. Immigration and Naturalization Service from the 1960 Census count on total population.

Annual tabulations are made on alien population, by nationality and residence status (permanent or non-permanent resident), for each State in the nation, as part of the alien address reports program of the Immigration and Naturalization Service. Except for special tabulations made at widespread intervals, there is no effort to show geographic detail below the State level. Neither age nor sex of the aliens is reported. Data presumably refer to the beginning of the year (the Census, in contrast, refers to April 1). The 1960 total for Hawaii was 51,316.

The 1960 U.S. Census reported place of birth but not citizenship. The foreign born population of Hawaii numbered 68,900 in 1960.

Population eligible to register

The population eligible to register to vote includes all residents except the following: persons less than 20 years of age; aliens; residents of the State for less than one year as of the day of election; persons unable to speak, read and write either Hawaiian or English; persons who are non compos mentis; persons convicted of felony unless pardoned. No one is deemed to have gained or lost residence simply because of his presence or absence while employed in the service of the United States, or while engaged in navigation or while a student in school. These provisions are part of the Hawaii State Constitution (Art. II, Sec. 1-3).

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The eligibility of members of the armed forces and their dependents appears to be a matter of some controversy. Most servicemen are natives of other States, stationed for varying periods in Hawaii and likely to move elsewhere at the end of their tour of duty. Many are registered voters in other States. However, a sizeable percentage are Hawaii residents. A sample survey made by the Honolulu Star-Bulletin in October 1962 and published by the Honolulu Redevelopment Agency (in Redevelopment and Housing Research, July 1963, pp. 14-19) indicated that 23,900 households headed by a member of the armed forces lived on Oahu. An estimated 8.3 per cent of these household heads were Hawaii-born, 71.5 per cent had lived in Hawaii at least one year (and 11.4 per cent over five years), and 6.7 per cent occupied their own homes.

A rough approximation of the population eligible to vote, by county, appeared in a report issued several years ago by the now-defunct Romanzo Adams Social Research Laboratory of the University of Hawaii (Robert C. Schmitt, Characteristics of Voters and Non-Voters in Hawaii, Report 31, November 1961). Its chief findings are summarized in table 1 of this presentation. A more recent estimate, prepared by the Department of Planning and Economic Development is given in table 2.

Many components of the eligible or ineligible population must be estimated from inadequate data. For example, it is possible to obtain civilian non-institutional population 20 and over from the 1960 Census, but data on military dependents registered in other areas, aliens 20 and over, absentee voters, and persons with less than one year residence are not readily available. Such a set of estimates is necessarily inexact, even at the State level; for counties or smaller areas, or for postcensal dates, even greater imprecision is inevitable.

Registered voters

Totals on registered voters are compiled for every election, by senatorial or representative district and precinct. A breakdown by sex is available but not usually published. The boundaries used for election districts and precincts, unfortunately, do not follow census enumeration boundaries.

Reapportionment on each basis

The choice of definition for "population" may greatly affect the number of legislators assigned to each county. For at least four of the definitions cited in the preceding pages -- total population, civilian population, the population in civilian areas, and registered voters -- sufficient statistics are available to permit making an apportionment by county. Lack of data precluded such a computation based on citizenship or eligibility to vote.

Apportionment was computed by the "Method of Equal Proportions," as recommended by the Advisory Committee to the Director of the Census (in 1921) and the National Academy of Sciences (in 1929) and described in Senate Document No. 304, 76th Congress, 3d Session (1940). The same method is specified in the Hawaii State Constitution (Art. III, Sec. 4).

Basic data were taken from the 1960 United States Census and reports of the Lieutenant Governor of Hawaii. Total population was 632,772 in 1960; civilian population, 585,505; the population of civilian areas, 561,100. There were 175,227 voters registered for the 1958 general election, 202,059 in 1960, and 221,650 in 1962. Data are given in full in table 3.

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The percentage of legislators allotted to each county differed significantly depending on the basis for apportionment. Oahu, for example, now has 10 of the 25 State Senators. Based on 1958 registered voters, the number would have been 17; on 1962 voter registration, 19; on either civilian population or the population living in civilian areas, likewise 19; and on total population 20. The neighbor islands, with 15 of the 51 Representatives based on 1958 voter registration, would have dropped to 13 if either 1962 registration or the population in civilian areas had been used and to 11 under either civilian or total population. Complete information appears in table 4.

The distribution by county varies somewhat by size of legislative body. Hawaii County, for example, would have 12.5 per cent of all members of a 16-member House or Senate, 8.0 [illegible]cent of the members of a 25-member body, 11.5 per cent in a 26-member group, and [illegible]r cent in a total membership of 35. This fluctuation is a result of the distr[illegible]tion of "fractional" apportionment under the "Method of Equal Proportions" and is unavoidable. Examples appear in table 5, which shows how many Senators or Representatives each county would receive, on the basis of total population, for each size of legislative body. In order to retain their present number of seats (15 in each house of the Legislature), the neighbor islands would have to ask for a 68-member Senate and 68-member House of Representatives. Such an arrangement would assign 53 seats in each body to Oahu -- an increase of 17 Representatives and 43 Senators for that Island.

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Table 1.--VOTING ELIGIBILITY AND PARTICIPATION OF THE POPULATION 20 YEARS OLD OR MORE: 1960

Subject	The State	By sex		By county	
		Male	Female	Honolulu	Other
20 years and over	360,193	196,431	163,762	284,901	75,292
Eligible to register	231,914	111,229	120,685	177,642	54,272
Registered 1/	202,059	104,591	97,468	147,123	54,936
Not registered	29,855	6,638	23,217	30,519	(1/)
Not eligible to register	128,279	85,202	43,077	107,259	21,020
Not U.S. citizens	51,316	34,997	16,319	31,830	19,486
Residents under 1 year 2/	8,529	4,327	4,202	7,400	1,129
In institutions	2,190	1,429	761	2,190	-
Military personnel	45,082	44,449	633	44,816	266
Military dependents	21,162	-	21,162	21,023	139

1/Totals for registered voters may include persons who voted in the previous election and subsequently died or moved away. As a result, the number of registered voters exceeded the number eligible by 664 in the counties other than Honolulu.

2/Civilian non-institutional only.

Source: Robert C. Schmitt, Characteristics of Voters and Non-Voters in Hawaii (University of Hawaii, Romanzo Adams Social Research Laboratory, November 1961).

Table 2.--ESTIMATED NUMBER OF PERSONS ELIGIBLE TO REGISTER TO VOTE IN HAWAII ELECTIONS: JANUARY 1, 1964

(For the State of Hawaii. Available information does not permit a county breakdown for 1964.

Group	Number
Resident population, including military personnel	714,100
Eligible to register to vote	280,500
Residents	267,700
Former residents, away at school	2,200
Former residents, in armed forces	10,600
Ineligible residents under 20 years old	307,800
Ineligible residents 20 years old and over	138,600
Aliens	47,600
Inmates of penal or mental institutions	4,500
Military personnel 1/	50,800
Military dependents 1/	23,600
Residents less than one year (civ. only)	12,100

1/All military personnel and dependents are assumed to be registered in other states or otherwise ineligible. In October 1962, military personnel and dependents who were 20 years of age or more, had one year or more of residence in Hawaii, and were living off base numbered 11,400 (including 5,900 servicemen and 5,500 dependents).

Source: Hawaii Department of Planning and Economic Development, Statistics Branch, estimates.

[fol. 965]

Table 3.--POPULATION AND VOTER REGISTRATION DATA REQUIRED FOR REAPPORTIONMENT OF THE HAWAII STATE LEGISLATURE

County	Population, 1960			Registered voters	
	Total	Civilian	In civilian areas	1958 election	1962 election
The State	632,772	585,505	561,100	175,227	221,650
[illegible] County	61,332	61,079	61,105	25,444	27,194
Honolulu County	500,409	453,582	429,076	121,647	164,324
[illegible] County	28,176	28,034	28,080	11,381	11,807
[illegible] County 1/	42,855	42,810	42,839	16,755	18,325

1/Includes Kalawao County.

Source: 1960 U.S. Census, Office of the Lieutenant Governor.

Table 4.--REAPPORTIONMENT OF HAWAII STATE LEGISLATURE, WITH MEMBERSHIP OF 25 AND 51 UNDER VARIOUS BASES

Membership and county	Current basis 1/	Reapportioned on basis of population 2/			Reapportioned on basis of voter registration 2/	
		Total	Civilian	In civilian areas	1958 election	1962 election
25 MEMBERS						
Honolulu County	10	20	19	19	17	19
Other counties	15	5	6	6	8	6
Hawaii	7	2	3	3	4	3
Maui 3/	5	2	2	2	2	2
Kauai	3	1	1	1	2	1
51 MEMBERS						
Honolulu County	36	40	40	38	36	38
Other counties	15	11	11	13	15	13
Hawaii	7	5	5	6	7	6
Maui 3/	5	4	4	4	5	4
Kauai	3	2	2	3	3	3

1/ 25 for Senate and 51 for House of Representatives.

2/ Either Senate, House of Representatives, or a unicameral legislature.

3/ Includes Kalawao County.

Note follows table 5.

[fol. 966]

Table 5.--APPORTIONMENT OF HAWAII STATE LEGISLATURE BY SIZE BASED ON TOTAL 1960 POPULATION

Size of body	City and County of Honolulu	Other counties			
		Total	Hawaii	Maui and Kalawao	Kauai
20	16	4	2	1	1
21	17	4	2	1	1
22	17	5	2	2	1
23	18	5	2	2	1
24	19	5	2	2	1
25	20	5	2	2	1
26	20	6	3	2	1
27	21	6	3	2	1
28	22	6	3	2	1
29	23	6	3	2	1
30	24	6	3	2	1
31	25	6	3	2	1
32	25	7	3	2	2
33	26	7	3	2	2
34	27	7	3	2	2
35	28	7	3	2	2
36	28	8	4	2	2
37	29	8	4	2	2
38	29	9	4	3	2
39	30	9	4	3	2
40	31	9	4	3	2
41	32	9	4	3	2
42	33	9	4	3	2
43	34	9	4	3	2
44	35	9	4	3	2
45	36	9	4	3	2
46	36	10	5	3	2
47	37	10	5	3	2
48	38	10	5	3	2
49	39	10	5	3	2
50	40	10	5	3	2
51	40	11	5	4	2
52	41	11	5	4	2
53	42	11	5	4	2
54	43	11	5	4	2
55	44	11	5	4	2
56	44	12	5	4	3
57	45	12	5	4	3
58	45	13	5	4	3
59	46	13	6	4	3

(continued on next page)

[fol. 967]

TABLE 3.--REAPPORTIONMENT OF HAWAII STATE LEGISLATURE, BY SIZE, BASED ON TOTAL 1960 POPULATION (cont'd)

Size of body	City and County of Honolulu	Other counties			
		Total	Hawaii	Maui and Kalawao	Kauai
47	13	6	4	3
48	13	6	4	3
49	13	6	4	3
50	13	6	4	3
51	13	6	4	3
52	13	6	4	3
52	14	6	5	3
53	14	6	5	3
53	15	7	5	3
54	15	7	5	3
55	15	7	5	3
56	15	7	5	3
57	15	7	5	3
58	15	7	5	3
59	15	7	5	3
60	15	7	5	3
61	15	7	5	3
61	16	8	5	3
62	16	8	5	3
62	17	8	5	4
63	17	8	5	4

Basis of tables 4 and 5: Computed from table 3 by the "Method of Equal Proportions."

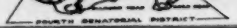
[fol. 968]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

DEFENDANT'S EXHIBIT B

Primary: Sat., Oct. 3
General: Tues., Nov. 3



HONOLULU

(City Clerk Staffing)

City Clerk's Office, City Hall	- Daily, 7:45 a.m. to 4:30 p.m.
Sears (Mall)	- Mon., Thurs., Fri., 12:30 to 8:30 p.m.; Tues. & Wed., 9 a.m. to 5 p.m.
Bank of Hawaii (downtown)	- Banking hours

(Volunteer Registrars)

HONOLULU

GEM (Ala Moana)	- Daily, noon to 4 p.m. & 6 to 9 p.m. Sats. & Suns., 10 a.m. to 5 p.m.
GEM (Kapalama)	- Daily, 6 to 9 p.m. Sats. & Suns., 10 to 5 p.m.
Pali Safeway	- Fridays, 6 to 9 p.m. Sats. & Suns., afternoons
U.of H. Library	- Schedule as posted
Kamehameha Shopping Center	- Fridays, 4 to 7:30 p.m. Sats., 10 to 2 p.m.
Family Fair	- Fridays, 6 p.m. to 9 p.m. Sats. & Suns., 11 a.m. to 3 p.m.

WAIMALU

Waimalu Shopping Center	- Schedule as posted

PEARL CITY

Take's Market	- Daily, 11 a.m. to 9 p.m.
Foodland	- Fridays, 6 p.m. to 9 p.m. Sats., 11 a.m. to 3 p.m.

WAIPAHU

Food City	- Fridays, 6 to 9 p.m. Sats. & Suns., 11 a.m. to 3 p.m.

EWA BEACH

Foodland	- Sats. & Suns., 11 a.m. to 3 p.m.

KANAKULI

Nakatani Store	- Daily, as posted

WAIANAE

Bank of Hawaii	- Fridays, 6 p.m. to 9 p.m. Sats. & Suns., 11 a.m. to 3 p.m.

WAHIAWA

Wahiawa Shopping Center	- Fridays, 6 p.m. to 9 p.m.
Big Way Supermarket	- Sats., 10 a.m. to 1 p.m.

HALEIWA

Kit's Supermarket	- As posted

KAHUKU

Kahuku Supermarket	- As posted

SUNSET BEACH

Fire Station	-
Sunset Beach Store	- Alternating Sunday afternoons

LAIE

Post Office	- As posted

HAUULA

Post Office	- As posted

PUNALUU

Punaluu Superette	- Store hours

KAAAWA

Post Office	- As posted

KANEOHE

Times Supermarket	- Daily and Sats., afternoons
Foodland	- Sats. & Suns., 11 a.m. to 3 p.m.

KAILUA

Times Supermarket	- Sats., 11 a.m. to 3 p.m.
Wigwam	- Weds. & Fris., 6 p.m. to 9 p.m.

WAIMANALO

Mel's Market	-
Post Office	- As posted
Sea Life Park	- Sats. & Suns., 11 a.m. to 5 p.m.

[fol. 970]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

DEFENDANT'S EXHIBIT C

PROCEDURE FOR VOTER REGISTRATION

HONOLULU

1. Who can qualify to register?

   Sections 11-6 and 11-10. Any Hawaii citizen 20 years of age on election day who:

   1. is able to speak, read and write English or Hawaiian.
   2. Has lived in this State one year and in his representative district three months.
   3. Is registered.

2. Procedure for registration.

   Section 11-8. Any person qualified to and desiring to register as an elector may present himself at any time during business hours to the City Clerk's Office, then and there to be examined under oath as to his qualifications as an elector. Each applicant shall make and subscribe to an application in substantially the following form: (See sample)

3. Number of Volunteer Registrars, Staff and Volunteers.

   Staff—35.

   Volunteers—200

   Breakdown:

Republican Party	—	75
Democratic Party	—	75
Koolauloa JC	—	3

Unity House	—	8
Councilmen	—	2
UPW	—	5
AFL-CIO	—	19
ILWU	—	10

4. How are the volunteers deputized?

They are required to fill out the Oath of Loyalty form and the Personal History Statement. Upon completion of these forms, they are deputized. (See Commission form)

5. Are the Volunteers properly schooled?

Yes, the volunteer registrars are required to attend and complete a two-hour briefing class supervised by the City Clerk's Election Division and held in four weekly sessions before a commission is issued to them.

6. How are they distributed over the Island of Oahu?

7. How many days throughout the year is registration open and when does registration close and for how long?

8. Absentee Registration Procedures. (Section 11-9)

9. Military Registration Procedures.

[fol. 971]

GUIDE TO REGISTRATION OF MILITARY PERSONNEL

DO NOT REGISTER ANY MILITARY PERSON OR SPOUSE WHOSE BIRTHPLACE IS NOT HAWAII AND WHOSE RESIDENCE IS ON THE MILITARY POST.

For military personnel to qualify for registration they must meet the following requirements:

1. Must reside off the military post or reservation for a period of one year and in the Representative District for three months.

2. Must indicate on service or organization records that Hawaii is his permanent domicile. The date when this indication is made counts toward the one year residence requirements. Thus, if he makes his indication today, the period for fulfillment of the residence requirements starts from this date on.

3. At the time of applying for registration, must produce a document or letter certifying to:

   A. That his records indicate that Hawaii is the permanent domicile and date of this indication.

   B. That he is permitted to live off base and have lived off base at such an address for a period of time. (Dates)

   C. The above statement must be signed and certified by the Officer-in-charge.

	Present	1960 Pop.

Area and District	1960 Population	Present No. of Legislators	1960 Pop. Average Per Legislator	
State of Hawaii	632,772	76	632,772	
THE SENATE				25,000
First - Hawaii	44,297	5	8,859	
Second - Hawaii	17,035	2	8,517	
Third - Maui	42,855	5	8,571	
Fourth - Oahu	182,307	5	36,461	
Fifth - Oahu	318,102	5	63,620	
Sixth - Kauai	28,176	3	9,391	
THE HOUSE				12,400
First - Hawaii	5,030	1	5,030	
Second - Hawaii	31,553	3	10,517	
Third - Hawaii	7,714	1	7,714	
Fourth - Hawaii	11,369	1	11,369	
Fifth - Hawaii	5,666	1	5,666	
Sixth - Maui	7,138	1	7,138	
Seventh - Maui	35,717	4	8,929	
Eighth - Oahu	68,281	4	17,070	
Ninth - Oahu	42,816	2	21,408	
Tenth - Oahu	95,118	4	23,779	
Eleventh - Oahu	57,743	3	19,247	
Twelfth - Oahu	25,552	3	8,517	
Thirteenth - Oahu	28,592	2	14,296	
Fourteenth - Oahu	42,476	4	10,619	
Fifteenth - Oahu	60,125	6	10,020	
Sixteenth - Oahu	42,750	4	10,687	
Seventeenth _ Oahu	36,956	4	9,239	
Eighteenth - Kauai	28,176	3	9,392	

[fol. 972]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII
INTERVENORS-PLAINTIFFS' EXHIBIT GO-1

[fol. 973]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

INTERVENORS-PLAINTIFFS' EXHIBIT GO-2

WIRTZ: The concensus, as I gather, of this Convention and of the Legislative Committee is that we should have two bases of representation in a bicameral legislature, one of the houses to be on the basis of a population as indicated by means of registered votes; the other to be on the basis of a combination of geographical and political subdivisions, more or less patterned after our present existing Senate, keeping insofar as possible the same ratio and proportion. Now the idea of having the two bases of reapportionment is to provide a truly bicameral legislature with balances and checks. The Senate is designed so that no county, no one county or no one senatorial district has control over that house; whereas, based upon population, obviously, in the House of Representatives the control will be at present in the County of Oahu. Now in order—if we believe that this is a fair basis of reapportionment, and if we believe in a true bicameral legislature with proper checks and balances, I believe that this proviso is essential, because without it the whole work of this Convention in adopting that basis of reapportionment can be destroyed in one amendment.

I want to point out that this ratification procedure that applies to this section is the same procedure that is incorporated by reference for all constitutional amendments that are introduced in the legislature and submitted to referendum of the people. And it seems to me that to avoid the problem of getting in actuality a unicameral legislature with two houses, and by that I mean two houses based upon the same principle of representation, we have to put in this proviso so that—and this refers only to senatorial representation—it requires a majority of the counties whose representation is being affected to approve of such amendment. (Vol. II, Proceedings of the Constitutional Convention of Hawaii, p. 760.)

[fol. 974]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

INTERVENORS-PLAINTIFFS' EXHIBIT GO-4

STATE OF HAWAII
RESULT OF VOTES CAST
GENERAL ELECTION
TUESDAY, NOVEMBER 3, 1964

I DO HEREBY CERTIFY That the following is a true and accurate tabulation of the votes received by the respective candidates and of the votes received on the five (5) Proposed Amendments to the Constitution of the State of Hawaii, viz: Article IX, Section 2; Article IV, Section 2; Article II, Section 1; Article IX, Section 3; Article IX, Section 5; at the State General Election held on Tuesday, November 3, A.D. 1964, in the State of Hawaii.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the Great Seal of the State of Hawaii to be affixed.

DONE at Iolani Palace, in Honolulu, Hawaii, this 14th day of November, A.D. 1964.

William A Richardson

LIEUTENANT GOVERNOR OF HAWAII

[fol. 975]

RECAPITULATION OF VOTES CAST

REPRESENTATIVE DISTRICT	HAWAII						MAUI			OAHU											KAUAI		GRAND
	1	2	3	4	5	TOTAL	6	7	TOTAL	8	9	10	11	12	13	14	15	16	17	TOTAL	18	TOTAL	TOTAL
TOTAL REGISTERED VOTERS	2406	15289	3075	4329	3031	28,130	2904	15882	18,786	27073	8934	23859	15148	11500	6456	18571	31302	18201	19135	180,179	12266	12,266	239,361
VOTES CAST	2228	14185	2898	3927	2786	26,024	2554	14442	16,996	23863	8100	21471	13455	10513	5561	16284	27407	16436	17268	160,358	11316	11,316	214,694
PRESIDENTIAL																							
(R) GOLDWATER, Barry M. / MILLER, William E.	328	2647	414	930	643	4,962	440	3113	3,553	6261	1263	2898	1666	2022	642	3348	6775	3119	5542	33,536	1971	1,971	44,022
(D) JOHNSON, Lyndon B. / HUMPHREY, Hubert H.	1809	10988	2365	2833	2016	20,011	2006	10660	12,666	17023	6578	17874	11306	8155	4610	12416	19921	12768	11208	121,859	8713	8,713	163,249
CONGRESSIONAL OFFICES																							
UNITED STATES SENATOR																							
(N) DOMINE, Lawrence	20	98	37	54	27	236	13	105	118	136	43	151	66	43	41	83	127	62	76	828	96	96	1,278
(R) FONG, Hiram L.	1073	6893	1406	2467	1697	13,536	1494	7746	9,240	13153	3989	9335	5891	5732	2384	8433	14548	8300	10890	82,655	5316	5,316	110,747
(D) GILL, Thomas P.	1037	6632	1343	1245	933	11,190	959	6051	7,010	9993	3913	11249	7137	4576	2967	7470	12116	7786	6039	73,246	5343	5,343	96,789
REPRESENTATIVE TO CONGRESS																							
(D) MATSUNAGA, Spark M.	1579	9016	1893	2542	1560	16,590	1689	8131	9,820	14148	5981	15303	9326	7130	3939	10735	18350	11216	9979	106,107	7707	7,707	140,224
(R) MILLIGAN, John E.	543	4525	922	1365	1021	8,376	1096	6382	7,478	12661	3167	7047	4702	4366	1600	6933	12442	6813	9882	69,613	3958	3,958	89,425
(D) MINK, Patsy Takemoto	1357	7608	1580	1985	1326	13,856	1340	7216	8,556	9910	4395	12723	7479	5043	3334	8014	13040	8150	6319	78,407	6090	6,090	106,909
(R) SUTTON, Richard Ike	479	3510	711	948	853	6,501	578	3641	4,219	7625	1509	4532	3179	2761	1158	4622	7427	4410	5995	43,218	2209	2,209	56,147
REJECTED BALLOTS	14	53	20	9	46	142	90	185	275	211	58	210	182	58	99	179	190	118	140	1,445	192	192	2,054
BLANK BALLOTS	5	61	3	18	4	91	2	24	26	14	22	8	9	5	3	2	16	22	9	110	17	17	244

AMENDMENTS TO THE CONSTITUTION OF THE STATE OF HAWAII

REPRESENTATIVE DISTRICT		HAWAII						MAUI			OAHU											KAUAI		GRAND
		1	2	3	4	5	TOTAL	6	7	TOTAL	8	9	10	11	12	13	14	15	16	17	TOTAL	18	TOTAL	TOTAL
PROPOSAL 1 Shall the proposed Amendment to Article IX, Section 2, of the Constitution of the State of Hawaii to provide for the election of the members of the Board of Education be adopted?	Yes	890	5151	1499	1817	1199	10,556	1483	5919	7,402	13791	5026	12169	7974	5911	3201	9148	14987	9031	9258	90,496	4126	4,126	112,580
	No	523	3682	840	982	874	6,901	499	3708	4,207	5434	1463	3788	2315	2218	862	3458	6819	3438	4970	34,762	1942	1,942	47,812
PROPOSAL 2 Shall the proposed Amendment to Article IV, Section 2, of the Constitution of the State of Hawaii relating to the election of the Lieutenant Governor be adopted?	Yes	882	5443	1531	1816	1190	10,862	1465	6153	7,618	14043	4970	11906	7380	6029	3010	9142	15727	9129	10134	91,470	4071	4,071	114,021
	No	505	3210	762	887	836	6,200	458	3207	3,665	4979	1411	3725	2592	1989	944	3386	5830	3194	3986	32,036	1652	1,652	43,553
PROPOSAL 3 Shall the proposed Amendment to Article II, Section 1, of the Constitution of the State of Hawaii to eliminate the literacy qualification for voting be adopted?	Yes	687	3625	1253	1436	835	7,836	1196	4250	5,446	8128	3384	8266	5096	3764	2272	5866	8883	5615	5168	56,442	2805	2,805	72,529
	No	662	4699	1001	1188	1027	8,577	672	4582	5,254	10367	2636	6950	4408	3953	1515	6284	11831	6308	8407	62,659	2721	2,721	79,211
PROPOSAL 4 Shall the proposed Amendment to Article IX, Section 3, of the Constitution of the State of Hawaii relating to the Superintendent of Public Instruction be adopted?	Yes	724	4316	1350	1582	990	8,962	1283	4875	6,158	11334	4262	10119	6112	4865	2605	7557	12597	7318	7787	74,556	3291	3,291	92,967
	No	610	3918	882	1014	943	7,367	553	3987	4,540	6539	1805	4719	3250	2585	1128	4189	7535	4111	5322	41,183	2042	2,042	55,132
PROPOSAL 5 Shall the proposed Amendment to Article IX, Section 5, of the Constitution of the State of Hawii relating to the President of the University of Hawaii and the Superintendent of Public Instruction be adopted?	Yes	716	3980	1310	1494	902	8,402	1221	4561	5,782	9968	3782	9258	5662	4275	2349	6598	10943	6416	6857	66,108	3056	3,056	83,348
	No	622	4239	915	1110	1047	7,933	641	4343	4,984	7978	2165	5679	3770	3213	1392	5234	9247	5151	6563	50,392	2354	2,354	65,663
REJECTED BALLOTS		28	105	40	56	39	268	81	160	241	141	86	139	125	102	68	120	137	142	102	1,162	99	99	1,770
BLANK BALLOTS		489	2229	441	975	580	4,714	353	2333	2,686	2338	1248	1709	2391	1982	1256	2505	2478	3091	2167	21,165	2512	2,512	31,077

FOR TH

INTERVENOR

PROPOSED SENATORIAL DISTRICT

SENATORIAL DISTRICTS		NUMBER OF SENATORS	REGIST
HAWAII	FIRST	3	
MAUI	SECOND	2	
OAHU	THIRD	3	
	FOURTH	4	
	FIFTH	4	
	SIXTH	4	
	SEVENTH	4	
KAUAI	EIGHTH	1	
		25	

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FOR REMAINDER OF PAGE

[fol. 976]

In the United States District Court
For the District of Hawaii

411

Intervenors-Defendants' Exhibit S-8

Proposed Senatorial Districts

Districts	Number of Senators	1964 Registered Voters
First	3	28,130
Second	2	18,786
Third	3	27,073
Fourth	4	35,780
Fifth	4	39,361
Sixth	4	40,629
Seventh	4	37.336
Eighth	1	12,266
	25	239,361

[fol. 977]

SUPREME COURT OF THE UNITED STATES

Nos. 318, 323 and 409, October Term, 1965

JOHN A. BURNS, Governor the State of Hawaii, Appellant,

v.

WILLIAM S. RICHARDSON, ET AL.;

ELMER F. CRAVALHO, ET AL., Appellants,

v.

WILLIAM S. RICHARDSON, ET AL.; and

KAZUHISA ABE, ET AL., Appellants,

v.

WILLIAM S. RICHARDSON, ET AL.

Appeals from the United States District Court for the District of Hawaii.

ORDER NOTING PROBABLE JURISDICTION—October 11, 1965

The statements of jurisdiction in these cases having been submitted and considered by the Court, probable jurisdiction is noted. The cases are consolidated and a total of three hours is allotted for oral argument.

Mr. Justice Fortas took no part in the consideration or decision of these cases.

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MISCELLANEOUS:

Proceedings of the Constitutional Convention of Hawaii 12, 13, 17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No.

JOHN A. BURNS, Governor of the State of Hawaii,
Appellant,

v.

WILLIAM S. RICHARDSON, ET AL., *Appellees.*

Appeal from the United States District Court for the District of Hawaii

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JURISDICTIONAL STATEMENT

Appellant, John A. Burns, Governor of the State of Hawaii, appeals from the order of the United States District Court for the District of Hawaii dated February 17, 1965, and entered on April 9, 1965, and the order of that court entered on April 28, 1965, and submits this Statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that substantial questions are presented.

OPINIONS BELOW

The opinion of the District Court dated February 17, 1965, is reported at 238 F. Supp. 468. Its opinion dated April 28, 1965, is reported at 240 F. Supp. 724. The opinions and orders are set forth as Appendices

A and C, respectively, pp. 1a to 20a and 24a to 38a, respectively, *infra.*

JURISDICTION

This suit was brought under the Civil Rights Act, 42 U.S.C. §§ 1983, 1988, and under 28 U.S.C. § 1343, for a declaration of the invalidity, and to enjoin the enforcement, operation and execution, of the provisions of the Constitution of the State of Hawaii establishing the apportionment of seats in the Hawaii Legislature, on the ground of their repugnancy to the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States. (R. 2-33)*

The first of the orders of the District Court from which this appeal is taken, was dated February 17, 1965, but was not entered with the Clerk until April 9, 1965 (Appendix A); the second was dated and entered on April 28, 1965 (Appendix C). The second order of the District Court reinstated certain provisions of the first order which had been, in the interim, provisionally amended and stayed.[1]

Notice of appeal was filed in the District Court on May 3, 1965. (R. 612)

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* References to the record certified by the Clerk of the District Court (apart from references to the reporter's transcripts of hearings and evidentiary proceedings) are designated as "R." References to the reporter's transcript of the hearing held on August 24, 1964, on the application for a preliminary injunction are designated as "H." References to the reporter's transcript of the evidence submitted at the hearing on the merits in January, 1965, are designated as "Tr."

[1] The first order was, in substance, under suspension until the April 28 order. See pp. 9-11, *infra;* Appendix B, pp. 21a-23a, *infra.* Thus there was no final order of the District Court until April 28, 1965.

The jurisdiction of the Supreme Court to review the orders by direct appeal is established by 28 U.S.C. §§ 1253 and 2101(b).

The following decisions sustain the jurisdiction of the Supreme Court to review the orders on direct appeal in this case: *Florida Lime & Avocado Growers, Inc.* v. *Jocobsen,* 362 U.S. 73 (1960); *Kesler* v. *Department of Pub. Safety,* 369 U.S. 153 (1962); *Reynolds* v. *Sims,* 377 U.S. 533 (1964); *Davis* v. *Mann,* 377 U.S. 678 (1964); *Roman* v. *Sincock,* 377 U.S. 695 (1964); and *Lucas* v. *Colorado General Assembly,* 377 U.S. 713 (1964).

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

This case involves Section 1 of Amendment XIV to the Constitution of the United States; Article III, Sections 1, 2, 3 and 4; Article XV, Sections 1, 2, 3 and 4; and Article XVI, Section 1 of the Constitution of the State of Hawaii; and Act 334, Session Laws of Hawaii 1949. The texts of the pertinent portions of the foregoing federal and Hawaii constitutional provisions and of Act 334 are set forth in Appendix D, pp. 39a-53a, *infra.*

QUESTIONS PRESENTED

The following questions are presented by this appeal:

1. Whether it was error for the District Court to have affirmatively decreed that Article III of the Hawaii Constitution, which provides for the apportionment of the Hawaii Legislature—including the provisions for the apportionment of the Hawaii House of Representatives—was "constitutional and valid" except for the provisions fixing the number of senators per senatorial district?

2. Whether the apportionment of the Senate and of the House of Representatives of the Hawaii Legislature, considered as a whole, is inseverable, so that the invalidity of the apportionment of the Senate results in the overall invalidity of the apportionment of the Legislature?

3. Whether apportionment on the basis of "registered voters" is a valid basis for the apportionment of seats in the Hawaii Legislature?

4. Whether the Hawaii Legislature has the power to enact at least temporary legislation reapportioning the Legislature pending the adoption of an amendment to the Hawaii Constitution comporting with Federal constitutional requirements?

5. Whether the present apportionment scheme for the House of Representatives of the Hawaii Legislature results in invidious, and constitutionally impermissible, discrimination in favor of larger multimember districts and against single-member and smaller multimember districts?

6. Whether the Equal Protection Clause requires that both houses of the Hawaii Legislature consist of representatives from single-member districts, unless there are shown valid and compelling reasons to justify some multimember districts?

7. Whether the District Court abused its discretion in requiring that there be in effect in Hawaii a permanent reapportionment plan—as opposed to an interim plan—by the November 1966 general elections, and by requiring that the constitutional amendment necessary to bring about a permanent plan be proposed by a constitutional convention, rather than by the Legislature?

8. Whether the Equal Protection Clause requires that the apportionment of delegates to any constitutional convention called for the purpose of amending the Hawaii Constitution be substantially on a population basis?

9. Whether the District Court abused its discretion in fashioning relief, by the employment of excessive and drastic measures to compel reapportionment, in that it prohibited the Legislature from enacting legislation essential for the normal operation of state and municipal offices in Hawaii and essential for the continuation of programs for the health and welfare of the people of Hawaii, until such time as reapportionment legislation had been passed to the satisfaction of the District Court?[2]

STATEMENT OF THE CASE

Appellant is the Governor of the State of Hawaii and was an intervenor-plaintiff in the proceedings below. This proceeding was instituted in the United States District Court for the District of Hawaii on August 13, 1964. (R. 2-33)

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[2] This aspect of the appeal, relating to paragraph 4 of the first order (Appendix A, pp. 19a-20a, *infra*) and paragraph 2 of the second order (Appendix C, p. 37a, *infra*), was the subject of an Application for a Stay presented to Mr. Justice Douglas on May 13, 1965, and by him granted on May 21, 1965. Inasmuch as the Legislature, after the granting of the Stay, passed the necessary legislation at the Regular Session of the Third Legislature, this question is not of present importance and we will not develop it in this Jurisdictional Statement. However, against the possibility that the District Court's order may be read as prohibiting legislation at the future sessions of the Legislature, rather than simply at the Regular Session of the Third Legislature—to which it appears directed—we reserve the right to brief this question in our presentation of the case to the Court on the merits, should probable jurisdiction be noted.

On that day, certain residents, taxpayers and qualified voters of the City and County of Honolulu, State of Hawaii, on their behalf and on behalf of others similarly situated, filed a complaint against the Lieutenant Governor of the State of Hawaii in his capacity as the State officer responsible for supervising State elections. Plaintiffs alleged, and sought a declaration, that those sections of the State Constitution establishing and pertaining to the apportionment of the Senate and the House of Representatives of the Hawaii Legislature denied to plaintiffs due process of law and the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

The complaint alleged that (a) the Senate was apportioned on the basis of geography and not of population, whereby senatorial districts containing 21 per cent of the population elect 79 per cent of the total number of senators; (b) the House of Representatives was apportioned on the basis of registered voters and not of population, with the result that plaintiffs' districts have fewer representatives than if apportionment had been based on population; (c) the apportionment plan covering both the Senate and the House of Representatives of the Hawaii State Legislature was an integrated apportionment scheme for overall legislative representation, and that portion of such plan covering the House of Representatives is not severable from that portion covering the Senate, and therefore the invalidity of the apportionment of the Senate invalidates that of the House of Representatives; and (d) the application of the apportionment provisions of the State Constitution resulted in a grossly unfair weighting of both houses of the Legislature in favor of the lesser populated areas of the State and in an unconstitutional apportionment of both houses.

Plaintiffs also prayed for a declaration that the Hawaii State Legislature has the power to provide for provisional apportionment by statute pending the adoption of an appropriate constitutional amendment, and that any apportionment law must provide for the apportionment of both houses on the basis of population. They prayed that defendant Lieutenant Governor be enjoined from performing any duties relating to or affecting the nomination and election of State legislators in the 1964 and 1966 elections unless and until such time as the Legislature had been reapportioned to the satisfaction of the district court. Together with the complaint, plaintiffs filed a motion for preliminary injunction to enjoin the defendant from performing his duties affecting the 1964 elections under existing provisions of the Hawaii Constitution.

Pursuant to 28 U.S.C. §§ 2281 and 2284, a district court of three judges was convened. On August 24, 1964, the appellant Governor and certain state senators and a representative were permitted to intervene as intervenors-plaintiffs and certain other State senators and representatives as intervenors-defendants. (R. 669)

The appellant Governor joined substantially in the allegations and prayer of the original plaintiffs. It was then, and continues to be, appellant's position that the existing apportionment of the Legislature of Hawaii, both as to the Senate and as to the House of Representatives, violates the Due Process and Equal Protection Clauses of the Constitution of the United States, in that the Legislature is not apportioned substantially on a population basis.

On August 26, 1964, the District Court orally denied the motion for preliminary injunction against conduct

of the 1964 elections under existing law. (R. 669) Thereafter briefs were filed and a hearing on the merits was held on January 11, 12, and 13, 1965.

The District Court's decision entered April 9, 1965, and dated February 17, 1965, held unconstitutional and invalid those provisions of Article III, Section 2 of the Hawaii Constitution fixing the number of senators per senatorial district. (Appendix A, p. 19a, *infra.*) However—without, of course, having before it any plan for the reapportionment of the Senate—the District Court also at this junction affirmatively held that the apportionment of the Hawaii Senate and that of the Hawaii House of Representatives were severable, and that the plaintiffs and appellant had failed to prove that the apportionment of the House caused any invidious discrimination in the weight of the plaintiffs' vote, or that the apportionment was the result of arbitrary or capricious action. Accordingly, the District Court then undertook to enter an order expressly declaring the remainder of the Article of the Hawaii Constitution dealing with the apportionment of the Legislature to be "constitutional and valid." (See Appendix A, p. 19a, *infra.*)

The District Court also held that "registered voters" was a permissible basis of apportionment. The court denied the power of the Legislature to enact provisional reapportionment legislation and held that "any change in the representation of senatorial districts must be by constitutional amendment" (Appendix A, p. 17a, *infra.*) Finally, the court denied "all other relief prayed for in the Complaint, Complaint in Intervention, and Cross-Complaint." As to remedial action, by paragraph 4 of its order, the court enjoined the parties from taking final action upon any legislation

(except such actions as were necessary to organize both houses at the regular session of 1965 and to appropriate funds for the session), until the Legislature had enacted legislation providing for amendment by a constitutional convention of the invalidated provisions of the Hawaii Constitution.[3] Jurisdiction was retained for all purposes, including that of judicially reapportioning the Senate in the event of failure of adoption of an appropriate amendment in time for the 1966 elections.

On March 9, 1965, on the motion of intervening defendant legislators, the court amended paragraph 4 of its order of February 17, 1965, to allow the Legislature to enact a provisional reapportionment plan and to propose a constitutional amendment by legislation instead of by constitutional convention. (See Appendix B, pp. 22a-23a, *infra.*) More specifically, under the amended order, the legislators were enjoined from taking final action on any legislation until the Legislature had (1) enacted a reapportionment and redistricting plan for the Senate on the basis of 1964 registered voters to be applicable to the 1966 elections, (2) adopted a proposed constitutional amendment embodying pertinent provisions of the provisional plan, to be presented to the electorate for ratification at the 1966 general election, and (3) provided for submission to the electorate at the 1966 general election the question: "Shall there be a convention to propose a revision of or amendments to the Constitution?" These measures were to be enacted by the Legislature on or before the twentieth calendar day following the date of the order, and submitted to the court for approval, and if they were not approved by the court, the original injunction was to be automatically reinstated.

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[3] See note 2, *supra.*

On March 18, 1965, the court was advised that a provisional plan, in substance approved by both houses, was then in conference committee and ready to be presented to the court whereby the Senate was to be reapportioned by dividing the State into the same existing six senatorial districts, changing only the number of senators allocated to each district, based upon the use of the method of equal proportions. By that plan, two senators were to be apportioned to the first senatorial district—East Hawaii; one to the second—West Hawaii; two to the third—Maui; nine to the fourth—Southern Oahu; ten to the fifth—the remainder of Oahu; and one to the sixth—Kauai. Briefs were filed by the parties on the question of the validity of the plan. (R. 458-532)

The court immediately informally advised the parties that such a grossly lopsided apportionment of senators, whereby forty per cent of the entire Senate would come from one senatorial district in Oahu and thirty-six per cent from another alongside, would not be acceptable. The plan was forthwith withdrawn from conference committee for reconsideration by the House of Representatives. Shortly thereafter, the District Court informally indicated by a memorandum from Judge Beeks to Judge Pence, concurred in by Judge Jertberg and released to the parties, that because Hawaii had a multimember district House, any other than single-member senatorial districting would have to be justified to the court. (Appendix E, pp. 54a-55a, *infra.*)

On April 14, 1965, the Legislature passed and intervening defendant legislators submitted to the court three bills pursuant to the court's order of March 9, 1965: (1) a statute providing for provisional reappor-

tionment of the Senate; (2) a proposed constitutional amendment embodying the same reapportionment; and (3) a statute calling for submission to the electorate of the question of whether a constitutional convention should be called. (R. 537-79)

On April 15, 16, and 17, 1965, testimony and arguments on the three Senate reapportionment bills were heard. On April 19, 1965, the court stayed its injunction against enactment of legislation, pending its ruling on the bills submitted. (R. 580-81)

On April 28, 1965, on the 58th day of the 60-day legislative session, the court issued its decision and order disapproving the provisional plan for the reapportionment of the Senate and reinstating its injunctive restraint against the legislators. (Appendix C, pp. 24a-38a, *infra.*)

On May 3, 1965, appellant Governor filed his notice of appeal to this Court. (R. 612-19) On May 7, 1965, certain intervenor-defendant senators and certain intervenor-defendant representatives filed notices of appeal to this Court. (R. 641-61)

On May 7, 1965, appellant Governor filed in the District Court a motion to suspend the injunction against the legislators and to stay the order of April 28, 1965, pending determination of his appeal to this Court. (R. 620-38) The District Court denied this motion on May 11, 1965. (R. 666-67) On May 13, 1965, appellant Governor applied to Mr. Justice Douglas for a stay of the injunction against legislation. By order dated May 21, 1965, Mr. Justice Douglas granted the stay.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The issues involved in this appeal are of vital concern, not only to the immediate parties to the case, but also to the people of the State of Hawaii, to those who will ultimately be charged with the duty of proposing amendments to the provisions of the Hawaii Constitution pertaining to the apportionment of the Hawaii State Legislature and, indeed, to all states confronted with similar problems under this Court's "reapportionment" decisions, *Baker* v. *Carr,* 369 U.S. 186 (1963), and *Reynolds* v. *Sims,* 377 U.S. 533 (1964), and its companion cases.

I. THE DISTRICT COURT ERRED IN AFFIRMATIVELY UPHOLDING THE CONSTITUTIONALITY OF THE PROVISIONS OF ARTICLE III OF THE HAWAII CONSTITUTION, APART FROM THE NUMBER OF SENATORS PER SENATORIAL DISTRICT. THE APPORTIONMENT OF THE HAWAII LEGISLATURE, CONSIDERED IN ITS ENTIRETY, FAILS TO MEET FEDERAL CONSTITUTIONAL REQUISITES

1. The District Court erred, initially, in failing to view the apportionment of the Hawaii State Legislature in its totality, in completely discounting the ample substantiation of interrelationship and nonseverability of the houses found in the *Proceedings of the Constitutional Convention of Hawaii,* and in holding that apportionment of both houses was severable and that therefore the patent invalidity of the Senate did not affect the validity of the apportionment of the House of Representatives.

The vice of the District Court's approach in practice is manifest. The District Court affirmatively undertook to declare that, except for the provisions fixing the number of senators per senatorial district,

the article of Hawaii's Constitution dealing with the apportionment of the State Legislature was "constitutional and valid."

But "it is simply impossible to decide upon the validity of the apportionment of one house of a bicameral legislature in the abstract, without also evaluating the actual scheme of representation employed with respect to the other house." *Maryland Committee v. Tawes*, 377 U.S. 656, 673 (1964). Thus, until the court had before it a plan for the reapportionment of the Hawaii Senate, it was impossible and erroneous for it to undertake to make any such finding of the constitutionality of the apportionment of the House. The District Court—even aside from the points which we make below to the effect that in itself the House was improperly apportioned—was required to hold the apportionment of the Hawaii Legislature as a whole unconstitutional. —Such a holding would, as we develop below, permit the Legislature to adopt an interim reapportionment plan for both houses.

Furthermore, by affirmatively placing the sanction and stamp of constitutional validity upon every[4] pro-

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[4] Not only does the court's order, by affirmatively sanctioning as "constitutional and valid" the provisions of Article III apart from those "fixing the numbers of senators per senatorial district," amount to an express provision that the total number of senators is severable from the system of senatorial apportionment, but its opinion appears expressly to hold that the overall number of senators is a severable provision. (Appendix A, p. 5a, *infra*.)

But obviously the number of legislators in each house is closely related to and inseverable from the overall apportionment scheme. The number and size of districts, for example, affect the number of legislators, and are in turn affected by whatever might be deemed to be an optimum number of legislators. The close interrelationship is indicated in I *Proceedings of the Constitutional Convention of Hawaii*, Standing Committee Report No. 92 (Plaintiffs' Exhibit 11,

vision of the Article of Hawaii's Constitution dealing with the apportionment of the State Legislature other than the provisions fixing the number of senators per senatorial district, the District Court's order inevitably has the disasterous consequence of tending, as a practical matter, to withdraw every matter but the number of senators per senatorial district from reexamination by the Legislature and the people of the State.

We submit that such an order is as unwise as it is unjustifiable under this Court's decisions in *Tawes*[5] and in *Lucas* v. *Colorado General Assembly*, 377 U.S.

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pp. 1, 5, 8). When it invalidated the Senate apportionment provisions, the court should also have struck down, until an appropriate plan for the general reapportionment of the Legislature was submitted and effected, the allied provisions setting the number of senators.

This is not, of course, to argue that there is anything inherently wrong with having twenty-five Senators, as the District Court appears to have misinterpreted the argument of plaintiffs and appellant below (Appendix A, p. 5a n. 4, *infra*). It certainly might be that the Legislature could be properly apportioned with any reasonable number of senators. *Cf. Reynolds* v. *Sims, supra*, at 581 n. 63. The fundamental error of the court below lay in disregarding the inseverability of the apportionment of the two houses, and in affirmatively sanctioning any provision of the State Constitutional Article in question until the obvious malapportionment of the Legislature had been rectified. *Cf. ibid.*, at 581.

[5] The Court in *Tawes* found that the Maryland Senate was malapportioned. While the Court also found, contrary to the contention of the appellees, that the Maryland House of Delegates was not apportioned on a population basis, it is of significance that the Court also held that:

> "... Furthermore, whether or not the House is apportioned on a population basis, the scheme of legislative representation in Maryland cannot be sustained under the Equal Protection Clause of the Federal Constitution, because of the gross disparities from population-based representation in the apportionment of seats in the Maryland Senate." 377 U.S., at 673.

713, 734-35 (1964).[6] —In restructuring its legislature to meet the standards of the Federal Constitution, the State should not be foreclosed as a practical matter from making adjustments in such matters as the apportionment of the House of Representatives, the total number of senators, the relationship between Senate and House districts, and the like, as may be necessary to arrive at a fair and adequate reapportionment. The District Court's course of affirmatively sanctioning the remainder of Article III of the Hawaii Constitution tends, as a practical matter, to narrow the area in which any reapportionment plan will operate. Thus, we submit that the unwisdom[7] of the order of the court below,

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[6] In *Lucas*, where the lower court had assumed—and the parties had apparently agreed—that the apportionment of the Colorado House as set forth in a proposed apportionment plan [Amendment No. 7] was validly apportioned on the basis of population, the Court nonetheless struck down the entire plan.

[7] Indeed, the District Court's own order of April 28, 1965, itself indicates the first consequences of its failure to order an overall apportionment. There, in reviewing and then disapproving the Senate reapportionment plan passed by the Legislature the court gave as one of its principal reasons for disapproval, the failure of the plan to take into account the necessary inter-relationship of the two houses:

> "In reapportioning and redistricting the senate, both houses overlooked the fact that, to be valid, the makeup of the senate must positively complement the makeup of the house, to provide the vital equality of voter representation. Both houses of the legislature seemingly forgot that the schemes of districting *each* house, when conjoined, must offer compensating advantages to the voters—not only to those voters within each representative district, be it senate or house, but to all voters throughout the State." (Emphasis original.) Appendix C, p. 32a, *infra*.
>
> ". . . [B]ecause both houses failed to look at the political scene in its totality and instead viewed the reapportionment scheme of the senate as if it were something that could be

as well as its variance with this Court's holdings, makes the judgment below a proper subject for plenary consideration on this appeal.[8]

2. Moreover, any contention that the question of the apportionment of the two houses is severable is in fact rebutted by the proceedings of the Constitutional Convention of Hawaii, which affirmatively disclose that the framers conceived of representation in and apportionment of both the Senate and the House of Representatives as interrelated parts of an entire plan. As stated by Delegate Cable A. Wirtz, a member of the Constitutional Convention, in the course of the convention debates (Governor's Exhibit GO-2):

> "WIRTZ: The concensus [sic], as I gather, of this Convention and of the Legislative Committee is that we should have two bases of representation in a bicameral legislature, one of the houses to be on the basis of a population as indicated by means of registered votes; the other to be on the basis of a combination of geographical and political subdivisions, more or less patterned after our present existing Senate, keeping insofar as possible the

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fashioned without consideration of its tight juxtaposition to the house of representatives, each house of the legislature jointly and separately took such a myopic view of the political problem involved, that they failed to see and anticipate the overall result of arbitrarily joining their independently constructed senatorial plan with the existing representative scheme." Appendix C, p. 35a, *infra*.

[8] In Part II below, we argue that the District Court erred in sanctioning the "registered voters" basis of apportionment, and that with this error, even if it were a severable matter, the District Court's approval of the House apportionment must be reversed. In Part III below, we argue that the multimember districting of the House of Representatives should not have been affirmatively sanctioned, in particular.

> same ratio and proportion. Now the idea of having the two bases of reapportionment is to provide a truly bicameral legislature with balances and checks. The Senate is designed so that no county, no one county or no one senatorial district has control over that house; whereas, based upon population, obviously, in the House of Representatives the control will be at present in the County of Oahu." II *Proceedings of the Constitutional Convention of Hawaii* 760.

This interrelationship is also indicated in the report of the convention's Committee on Legislative Powers and Functions (Plaintiffs' Exhibit 11, p. 2):

> "... Your committee has agreed that the house of representatives must be apportioned on the basis of the number of registered voters among the several major island divisions (the present counties) but that the present ratio of representation among the four existing senatorial districts should be maintained in the senate." I *Proceedings of the Constitutional Convention of Hawaii* 249, Standing Committee Rep. No. 92.

Other statements in the *Proceedings* amply show that the apportionment of one house was an inducement and compensation for the apportionment in the other—a Senate based on geographical representation, giving a controlling majority to the counties of Hawaii, Maui, and Kauai and a House of Representatives based on registered voters, giving a controlling majority to the City and County of Honolulu.

Accordingly, as a matter of historic fact, as well as a matter of law taught by this Court's decisions, the apportionment of the Hawaii House is inseverable from the apportionment of the Hawaii Senate, and it was error for the District Court to have affirmatively upheld the apportionment of the House.

II. THE "REGISTERED VOTERS" BASIS SANCTIONED BY THE DISTRICT COURT IS NOT A CONSTITUTIONALLY PERMISSIBLE BASIS FOR REAPPORTIONMENT

We submit that the District Court's holding that the number of "registered voters" in the various districts was an acceptable basis for reapportionment was in error, and that this holding raises an important question which this Court should decide after further briefs and oral argument. This is because the use of the "registered voters" test tends to discriminate against persons in the lower economic levels, and, under the circumstances prevailing in Hawaii, introduces other inequities into legislative apportionment, to such an extent that the formula cannot be squared with the Equal Protection Clause.

This holding by the District Court should be corrected in the interest of obtaining a fair reapportionment of the Senate in the proceedings to that end which the District Court has ordered. Moreover, as the statistics at p. 23 n. 12, *infra,* demonstrate, the error of this holding by the District Court leads to the conclusion that even viewing the question of the apportionment of the House as a severable matter, there was error in the District Court's holding that the apportionment of the House was constitutional.

1. In *Reynolds* v. *Sims,* 377 U.S. 533 (1964), this Court stated:

> "Population is, of necessity, the starting point for consideration and the controlling criterion for judgment in legislative apportionment controversies. . . . The Equal Protection Clause demands no less than substantially equal state legislative representation for all citizens, of all places as well as of all races." *Id.,* at 567-68.
>
> "We hold that, as a basic constitutional standard, the Equal Protection Clause requires that the

> seats in both houses of a bicameral state legislature must be apportioned on a population basis." *Id.*, at 568.

And in rejecting all apportionment schemes which submerged population as a controlling factor, the Court stated:

> "By holding that as a federal constitutional requisite both houses of a state legislature must be apportioned on a population basis, we mean that the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable." *Id.*, at 577.[9]

Wesberry v. *Sanders*, 376 U.S. 1 (1964), clearly teaches that *people*, not only registered voters, are entitled to representation. There, the term "people" used in Article I, section 2, of the Federal Constitution ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . . .") was construed to mean the inhabitants of the States as indicated by census data. It said:

> "The debates at the Convention make at least one fact abundantly clear: that when the delegates agreed that the House should represent 'people' they intended that in allocating Congressmen the

[9] Of the six reapportionment cases decided by this Court on June 15, 1964, only *WMCA, Inc.* v. *Lomenzo*, 377 U.S. 633, involved the use of a plan based on a system of enumeration other than total population. There the Court stated that New York used the State's total population exclusive of aliens, as determined by the last Federal census, but did not comment upon the validity of that formula. It does not appear that the question was raised. In all of the other cases, Federal census data, containing the total population of the States concerned, were judicially used in determining whether or not malapportionment existed.

> number assigned to each State should be determined solely by the number of the State's inhabitants. The Constitution embodied Edmund Randolph's proposal for a periodic census to ensure 'fair representation of the people,' an idea endorsed by Mason as assuring that 'numbers of inhabitants' should always be the measure of representation in the House of Representatives. The Convention also overwhelmingly agreed to a resolution offered by Randolph to base future apportionment squarely on number. . . ." 376 U.S., at 13-14.

While congressional districting cases, such as *Wesberry,* may not be directly controlling in state apportionment cases, as stated by this Court in *Reynolds* v. *Sims, supra:*

> "Nevertheless, *Wesberry* clearly established that the fundamental principle of representative government in this country is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a State." 377 U.S., at 560-61.

As stated further in *Reynolds* v. *Sims, supra:*

> "[T]he achieving of fair and effective representation for *all citizens* is concededly the basic aim of legislative apportionment . . . ." 377 U.S., at 565-66. (Emphasis supplied)

In *Davis* v. *Mann,* 377 U.S. 678 (1964), with respect to exclusion of military personnel from the apportionment base—an exclusion relied on by the Court below (Appendix A, pp. 9a-12a, *infra*)—this Court stated that:

> "Discrimination against a class of individuals, merely because of the nature of their employment,

without more being shown, is constitutionally impermissible." 377 U.S., at 691.[10]

2. The use of registered voters as a basis for Hawaii discriminates against those in the lower economic classes, and ignores, and accordingly discriminates against a substantial segment of the population who are not registered.

The proportion of registered persons in Hawaii—and very likely in other States—in the lower economic brackets is substantially less than those in the higher. According to Table 9 in plaintiffs' Exhibit No. 15, as of January, 1961, of persons with a family income of less than $4,000, only 43.8% of those eligible were registered, while of those in the $10,000 to $14,999 bracket, 72.4% were registered, and of those in the $15,000 or more bracket, 77.7% were registered. It is apparent therefrom that the use of registered voters unduly favors those on the higher economic levels and discriminates against those on the lower.[11] The right to

[10] The Court in the *Davis* case pointed out that Virginia's policy as evidenced by its election laws "favors and fosters voting by military and military-related personnel." *Id.*, at 691. See note 11, *infra.*

[11] Furthermore, the statement of the District Court in its February 17, 1965, decision that "87.1% of all of the possible *voting population* of the State" (emphasis original) were registered, is misleading. There the court stated that 231,914 persons could qualify as being eligible to register and that of this number 202,059 were registered. (Appendix A, p. 13a, *infra.*) No military personnel or their dependents were included among the 231,914 said to be eligible to register. In fact, as indicated in Table 7 of plaintiffs' Exhibit No. 14, footnote 1, in October, 1962, 11,400 military personnel and dependents met the qualifications for registration (that is, 20 years of age or more, with one year or more of residence in Hawaii and living off base). On the other hand, the 202,059 listed as registered voters included some military personnel and their dependents.

Table 7 of plaintiffs' Exhibit No. 14 shows that in 1964, 283,400 persons, exclusive of military personnel and dependents, were eligible to register. To this figure should be added 11,400 military personnel and dependents who met the age and residence require-

be fairly and effectively represented is a fundamental one and should not be made to depend upon an assiduousness in the pursuit of other rights, such as the right to vote.

Moreover, even a "civilian population" basis of apportionment, which was urged against the contention of appellant that total population should be the guide, produces inequities by excluding military personnel. Defendant's Exhibit A indicates that as of July, 1963, there were 23,900 households headed by a member of the armed forces on Oahu and of these military household heads 71.5 per cent, or 17,088, had been in Hawaii for more than one year. (Defendant's Exhibit A, p. 4) Their interests were not merely casual, as in the case of tourists and other transients. In 1960, all military personnel and their dependents in Hawaii were included among the "people" of Hawaii in determining the number of Representatives in Congress to which Hawaii was entitled. They should also be included in determining representation to the State legislature. *Davis* v. *Mann,* 377 U.S. 678, 691 (1964).

3. Finally, it cannot be said that in Hawaii the use of the "registered voters" test rather than a population test would be harmless error. The fact of the

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ments for registration. This 11,400 figure was as of October, 1962. (Table 7, n. 1, plaintiffs' Exhibit No. 14) Comparable 1964 data were not available. However, the military population in 1964 was larger than in 1962 (Table 4, plaintiffs' Exhibit No. 15) and so it appears that the 11,400 figure is conservative.

The addition of the 11,400 military personnel and dependents shows 294,800 to be the total possible voting population. Of these, 239,361, or 81%, were registered for the 1964 general elections. (Governor's Exhibit GO-4, last page) This still excludes from the apportionment base 55,439 eligible but unregistered persons or about one-fifth of the total eligible to register, not to mention 405,539 of the non-military population (total population less military and dependents, less registered voters). (Table 7, plaintiffs' Exhibit No. 14)

matter is that there is no consistent parallel in Hawaii between the ratio of registered voters and population. This may be seen from the excerpts from plaintiffs' Exhibit No. 1 which are set forth in the margin.[12]

For example, the number of registered voters in 1960 in the fourth and fifth senatorial districts was almost identical: 73,981 in the fourth, and 73,142 in the fifth senatorial district. However, the 1960 popu-

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Area and District	1960 Population*	1960 Reg. Voters**	Reapportionment by Method of Equal Proportions Based on: Pop. 1960	Reg. Voters 1960
State of Hawaii	632,772	202,059	76	76
THE SENATE				
First—Hawaii	44,297	19,266	1	2
Second—Hawaii	17,035	6,793	1	1
Third—Maui	42,855	17,539	2	2
Fourth—Oahu	182,307	73,981	7	9
Fifth—Oahu	318,102	73,142	13	9
Sixth—Kauai	28,176	11,338	1	2
THE HOUSE				
First—Hawaii	5,030	2,257	1	1
Second Hawaii	31,553	14,036	1	3
Third—Hawaii	7,714	2,973	1	1
Fourth—Hawaii	11,369	4,073	1	1
Fifth—Hawaii	5,666	2,720	1	1
Sixth—Maui	7,138	2,574	1	1
Seventh—Maui	35,717	14,965	3	3
Eighth—Oahu	68,281	18,369	6	5
Ninth—Oahu	42,816	7,410	3	2
Tenth—Oahu	95,118	17,003	8	4
Eleventh—Oahu	57,743	12,553	5	3
Twelfth—Oahu	25,552	10,000	2	3
Thirteenth—Oahu	28,592	7,807	2	2
Fourteenth—Oahu	42,476	16,056	3	4
Fifteenth—Oahu	60,125	25,869	5	6
Sixteenth—Oahu	42,750	16,176	3	4
Seventeenth—Oahu	36,956	15,880	3	4
Eighteenth—Kauai	28,176	11,338	2	3

Source: Department of Planning & Economic Development, State of Hawaii, July 28, 1964.

* Based on 1960 Federal Census.

** From Office of the Lieutenant Governor, State of Hawaii.

Instances when apportionment based on registered voters differs from that based on population are indicated by underscoring.

lation of the fourth senatorial district was 182,307; that of the fifth senatorial district was 318,102. Thus on the basis of registered voters, each district would be entitled to the same number of senators, nine, using the method of equal proportions. However, on the basis of population, the fifth senatorial district would be entitled to 13, and the fourth to seven senators.

Similar disproportion exists in the House districts—indicating that the District Court's holding that the House was constitutionally apportioned was in error, even if the apportionment of the House were a severable matter. In the House, on the basis of 1960 registered voters, the number represented by a legislator under existing apportionment ranges from a low of 2,257 registered voters in the first representative district to a high of 4,679 registered voters in the second representative district. On the basis of 1960 population, the range widens even more from a low of 5,030 persons in the first representative district to a high of 23,779 persons represented by a legislator in the tenth representative district, under existing House apportionment.

III. THE MULTIMEMBER DISTRICTING OF THE HOUSE OF REPRESENTATIVES IS ARBITRARY AND CAPRICIOUS AND DENIES EQUAL PROTECTION

Appellant further contends that the Hawaii House of Representatives is improperly apportioned because of its "multimember" system of districting. The District Court, in affirmatively sanctioning the apportionment of the House, held otherwise. We submit that this point clearly raises a question of a nature which this Court should resolve, and furnishes an

We submit that the District Court erred at this juncture in affirmatively upholding the constitutionality of the apportionment of the House over the contention that the multimember districting of the House does not achieve fair, effective representation for all citizens, and accordingly is violative of the guaranty of equal protection.

As a matter of political realism, a voter in a multimember district has an advantage over one in a single-member district.

> "Certainly a voter in a four-member district will not only have four votes for representative, but he will also have four members of the House who will be especially concerned with his views and interests and amenable to his persuasion, since they will want the benefit of his suffrage for re-election. The voter in a single-member district, however, will have only one representative to look to express his views and espouse his interests." *Drew* v. *Scranton,* 229 F. Supp. 310, 327 (M. D. Pa. 1964), *remanded on other grounds,* 379 U.S. 40 (1964). *Cf. Butcher* v. *Bloom,* 415 Pa. 438, 467, 203 A. 2d 556, 572-73 (1964).

We recognize that *Fortson* v. *Dorsey,* 379 U.S. 433 (1965), teaches that multimember districting does not *per se* violate the Equal Protection Clause. However, the Court in *Fortson* took great pains to point out that it was there only judging such a system on its face. As the Court there noted, multimember districting may submerge minorities within a district, through design or otherwise. 379 U.S., at 439. This consideration is obviously of particular relevance to a State with as

many varying ethnic elements as Hawaii.[14] Our position is that in the light of the absence of any demonstrable rational basis for the multimember system in the House, as presently constituted, the District Court should not have proceeded to uphold affirmatively the constitutionality of the apportionment of the House. Of necessity, any such finding had to await a thorough analysis of the justification for the use of multimember districts in either house, after an overall plan for reapportionment of the Legislature as a whole had been devised, if that plan employed any such districts.[15]

Once again, the District Court's opinion of April 28, 1965, shows the early effects of the error it had committed in affirmatively sanctioning the present apportionment of the House. Implicit in the District Court's decision of April 28, 1965, is the conclusion that at least

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[14] The court below in its April 28, 1965, opinion, analyzing the six-member 15th representative district, observed that the district was too large, that one section thereof contained an extremely large concentration of persons of Japanese ancestry while another section contained an unusually high percentage of Caucasian residents, that certain sections thereof contained high-level professional people while another section contained laborers, clerical, and middle and lower-middle income people. Appendix C, pp. 30a-31a, *infra*. It implied that some of these groups are submerged in the large multimember district.

It should be observed that the multimember districting system employed in the Hawaii House does not even have the feature, which the system before the Court in the *Fortson* case had, of requiring that the various members from a multimember district each be a resident of a specific defined subdistrict.

[15] The presentation of the parties' evidence on the question whether such multimember districts as are included in the final plan were constitutionally justifiable would, of course, have the benefit of this Court's holding in *Fortson* that multimember districting is not per se a violation of the Fourteenth Amendment. The issues in the instant case were framed, and the evidence submitted, before this Court decided *Fortson*.

one house—the Senate, which was the subject of the court's remarks—should consist of single-member districts unless there is reasonable justification for some multimember districts. Properly. the burden of justifying multimember districting was placed upon the proponents of such districting. And the District Court correctly recognized that "There can be no truly representative government without a system of apportionment which provides potentially equal representation to the divergent factors incorporated within the body politic." (Appendix C, p. 31a, *infra.*) The District Court's inconsistent holding that one house[16]—but apparently not both—could be properly constituted on a multimember basis fully warrants this Court's plenary attention.

IV. WITH THE APPORTIONMENT OF THE SENATE DECLARED INVALID, THE LEGISLATURE HAS THE POWER TO REAPPORTION THE SENATE PENDING THE ADOPTION OF A VALID CONSTITUTIONAL AMENDMENT. SINCE SUCH A PROVISIONAL PLAN COULD EFFECTIVELY PROTECT PLAINTIFFS' RIGHTS, THE STATE SHOULD BE PERMITTED TO DECIDE ON THE METHOD BY WHICH ITS CONSTITUTION IS TO BE AMENDED

We contend that certain of the rulings of the District Court as to the procedure for effecting reapportionment are in error, and that these rulings present questions warranting plenary review by this Court together with the other questions raised by this appeal.

1. The District Court held that the Hawaii Legislature lacked the power to reapportion the Senate pending the adoption of a valid constitutional amendment,

[16] The District Court, in effect, because of its extraordinary action in affirmatively declaring the constitutionality of the House, selected the House as the one chamber which, under its view, could constitutionally have a multimember district organization.

and that consequently it was necessary that there be a constitutional amendment before the 1966 general elections. (Appendix A, pp. 17a-18a, *infra.*) This holding is in conflict with *Maryland Committee* v. *Tawes,* 377 U.S. 656 (1964).[17]

Tawes presented an essentially similar situation. There, the Maryland Court of Appeals held that if the apportionment provisions of the Maryland constitution were invalid, the General Assembly was empowered to enact a bill reapportioning its membership.[18] It stated that with the invalid provisions of the constitution no longer a part of the constitution, the powers of the legislature were plenary and not limited by constitutional provisions.

The proposition was affirmed by this Court:

> "With the Maryland constitutional provisions relating to legislative apportionment hereby held unconstitutional, the Maryland Legislature presumably has the inherent power to enact at least temporary reapportionment legislation pending adoption of state constitutional provisions relating to legislative apportionment which comport with federal constitutional requirements." 377 U.S., at 675-76.

The Hawaii Constitution, like that of Maryland, confers broad powers on the legislature. Article III, section 1 provides:

> "The legislative power of the State shall be vested in a legislature, which shall consist of two

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[17] Indeed, the District Court's decision dated February 17, 1965, conflicts with its order of March 9, 1965, for in the March 9 order it permitted the Legislature to enact an interim reapportionment and redistricting plan for the Senate effective for the 1966 elections and until a valid constitutional amendment became effective.

[18] *Maryland Committee* v. *Tawes,* 228 Md. 412, 438-39, 180 A. 2d 656, 670 (1962).

houses, a senate and a house of representatives. Such power shall extend to all rightful subjects of legislation not inconsistent with this constitution or the Constitution of the United States."

The invalidity of the apportionment provisions of the State constitution and resultant lack of applicable constitutional provisions, plus the provisions conferring plenary "legislative" powers over all "rightful subjects of legislation" on the Hawaii Legislature provide that Legislature, as a matter of federal law, with authority to reapportion at least temporarily.[19]—This Court has made clear that the federal judiciary may, as a matter of federal law, reapportion if necessary to prevent denial of constitutional rights. *Reynolds* v. *Sims,* 377 U.S. 533 (1964). It would be a strange holding that the power of the legislative body of a state would be any less, at least where the State constitution vests plenary law-making powers in it. After all, "primary responsibility for legislative apportionment rests with the legislature itself," *Maryland Committee* v. *Tawes, supra,* at 676, and "reapportionment . . . [is] basically a legislative function." *Roman* v. *Sincock, supra,* at 702.

Thus, we contend, the Legislature has the power to reapportion the Senate on an interim basis. Moreover, since, as we have developed in Points I, II and III above, the apportionment of the House cannot be held to be constitutional, the power of the Legislature to

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[19] See also, *Sincock* v. *Duffy,* 215 F. Supp. 169, 191 (D. Del. 1963), *aff'd sub nom. Roman* v. *Sincock,* 377 U.S. 695 (1964), where the court stated that with the Delaware constitutional provisions relating to legislative reapportionment declared invalid, the Delaware legislature could "then proceed to pass an apportionment statute meeting the requirements of the Fourteenth Amendment . . . ."

adopt an interim reapportionment plan would extend to both houses.

The District Court's holding to the contrary was apparently based on *Guntert* v. *Richardson,* 394 P. 2d 444 (Haw. 1964). It is clear that the reliance was an erroneous one.

Guntert was an original action submitted to the Supreme Court of Hawaii upon an agreed statement of facts in July, 1964. The plaintiffs in that suit sought to enjoin the conduct of any further elections of members of the Legislature under existing apportionment law on substantially the same grounds alleged by the plaintiffs in this proceeding. The hearing was directed essentially to the question of whether the Supreme Court should enjoin the 1964 elections.

The court said that although it could assume the invalidity of the composition of the State Legislature, in whole or in part, it would not interfere with the 1964 elections. *Cf. Reynolds* v. *Sims, supra,* at 585. Decision on all other matters was held in abeyance.[20]

The Hawaii Supreme Court did observe in dictum that, although the provision of the Hawaii Constitution providing that any constitutional amendment altering the basis of representation in the Senate required the approval of a majority of the votes upon the question in at least a majority of the counties of the state, was in itself unconstitutional, this fact did not "render invalid the requirement that the change [in the composition of the Senate] be by constitutional amendment." 394 P. 2d, at 448. However, the Hawaii court expressly stated that, inasmuch as the matter of

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[20] Thereafter, the case was dismissed by stipulation of the parties.

reapportionment was still in its early stages—the court's opinion was rendered the month after this Court's reapportionment decisions of June 1964—it was simply viewing the problem as one "of local law, not federal constitutional right." 394 P. 2d, at 447. It indicated that under other circumstances, such as litigation pending for a more protracted period, considerations of the speedy effectuation of federal rights would also have to be taken into account. *Ibid.* See *Roman* v. *Sincock, supra,* at 711-12.

And, most significantly, the Hawaii court made it perfectly plain that its dictum referred simply to a permanent plan of reapportionment and not to an interim reapportionment plan. The court's opinion, as to a temporary reapportionment plan, indicated clearly that it was of the view that both the judiciary and the state legislature could adopt a temporary plan. The court however, held that, on balance, no such effort needed to be made before the 1964 elections.[21]

The short of the matter is that not only did the Hawaii Supreme Court not deny the existence, as a matter of federal law, of a power in the Hawaii Legislature to reapportion even on a permanent basis, but that it expressly recognized the Legislature's power to reapportion on a temporary basis.

2. By paragraph 4 of the order dated February 17, 1965, the District Court required that a constitutional convention be convened, and that amendments to the

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[21] "We would not enjoin the holding of the 1964 elections under the existing apportionment unless prepared to supply a temporary reapportionment plan, if the legislature should not do so . . . ." 394 P. 2d, at 449.

Hawaii Constitution proposed by the convention be submitted to the electorate at a special election to be held not later than January 30, 1966. In temporarily amending that order, the court by its order of March 9, 1965, allowing initiation of constitutional amendments by the Legislature rather than through a convention, required that the amendments to be proposed by the Legislature be submitted to the people at the November, 1966, general election for ratification.[22] (Appendix B, pp. 21a-23a, *infra.*) It is submitted that neither the January, 1966, nor the November, 1966, date is required by the Equal Protection Clause, as interpreted by this Court, as far as a constitutional amendment is concerned, because interim reapportionment measures can protect the plaintiffs' rights.

Appellant Governor does not dispute the prescription of the District Court that the 1966 elections be conducted on a properly apportioned basis. His contention is that the court was in error in requiring a too rapid adoption of a permanent plan, particularly when effectuation of plaintiffs' rights in the interim can be accomplished by means of a provisional plan adopted by the Legislature, or one devised by the court or by any of the parties and adopted by the court.[23] None of this Court's state reapportionment

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[22] The order of April 28, 1965, withdrew that amendment and restored paragraph 4 of the original order. Appendix C, p. 37a, *infra.*

[23] The District Court's conclusion was influenced by its ruling that the Legislature was without power to provide an interim reapportionment plan. In point 1 above, we contend that this ruling was erroneous. But in any event it is indisputable that the court had the power to promulgate an interim plan of its own authority. *Reynolds* v. *Sims,* 377 U.S. 533, 586-87 (1964).

decisions mandate or warrant the admittedly very expensive and exceedingly tight time schedule imposed by the court below in terms of a *permanent* plan. (Appendix C, p. 25a, *infra.*)

Moreover, with a similar inflexibility, the orders of the District Court mandate the convening of a constitutional convention as the procedure for the adoption of a permanent plan. It would be more consonant with equitable considerations to permit the State of Hawaii to determine whether it should take the legislative or the convention route in amending its constitution, since, once an interim plan has been put into effect, justice would not be delayed thereby.[24]

3. In ordering the Legislature to provide for the calling of a constitutional convention, the District Court required the enactment of legislation providing for a special election to elect delegates to the convention "in the manner provided in the Constitution. Such legislation *may* include legislative action under Article XV, Section 2, 4th paragraph, of the Constitution." (Appendix A, pp. 19a-20a, *infra.*) (Emphasis supplied.) That provision states that "unless the legislature shall otherwise provide, there shall be the same number of delegates to such convention, who shall be elected from the same areas . . . as required for the Hawaii State Constitutional Convention of 1950." The election of delegates to the convention of

[24] The Hawaii Constitution provides that constitutional amendments may be proposed either (i) by a constitutional convention, or (ii) by a two-thirds vote of each legislative house at a session or a majority vote of each legislative house at two successive sessions. Article XV, Sections 2 and 3. See Appendix D, pp. 42a-44a, *infra.*

1950 was conducted pursuant to Act 334, Session Laws of Hawaii 1949 (Appendix D, pp. 51a-53a, *infra*), which apportioned 63 seats among six representative districts. On its face this Act allocated representation on a basis other than that of population. Thus the District Court's order permits apportionment of the constitutional convention on a basis on which a state legislature could not itself be validly apportioned.

If the court below was—contrary to our contention—correct in directing the Legislature to provide for a constitutional convention, we submit that its failure to order that the convention be apportioned on a population basis also presents an issue which this Court should resolve. *Cf. Maryland Committee* v. *Tawes, supra,* at 670. A constitutional convention is a law-making body responsible for framing or amending the organic law of the state, and its apportionment should be tested by the same constitutional standards as that of a legislature. The organization of a constitutional convention on a malapportioned basis would scarcely be an auspicious first step toward proper legislative apportionment. See *WMCA, Inc.* v. *Lomenzo,* 377 U.S. 633, 652 (1964).[25]

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[25] Obviously, it is quite a different matter from saying that a malapportioned legislature may itself legally adopt an interim or permanent reapportionment plan, if that plan is itself constitutional, to say that an entirely new legislative organ of government—a constitutional convention—should be permitted to be formed on a malapportioned basis.

CONCLUSION

We submit that this appeal presents serious and important issues under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and with respect to the techniques of reapportionment to be applied in Hawaii and, very likely, in other states. In the light of the orders below, which affirmatively upheld the apportionment of the House and mandated certain controversial techniques of reapportionment, the issues are ripe for plenary consideration by this Court.

The specified rulings of the court below, unless reversed by this Court, will impose practical obstacles to Hawaii's efforts to reapportion its Legislature. If this Court does not review and reverse the District Court's declaration that the House is—as contended by defendant and intervening defendants—constitutionally apportioned, the practical effect will be to remove the constitution of the House from the variables which may be adjusted to produce an overall fair system of reapportionment. Under these circumstances, it is unrealistic to assume that any permanent reapportionment plan will not repeat the errors of the provisional plan for the Senate invalidated by the court below.

As admitted by the District Court, its orders would place a "very expensive" burden upon the State of Hawaii and "demand the devotion of great time and effort from" its people. (Appendix C, p. 25a, *infra.*) Hawaii should not be made to assume such burdens

without a review by this Court of the adequacy and correctness of the orders of the court below.

Probable jurisdiction should therefore be noted.

Respectfully submitted,

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July, 1965

APPENDIX

APPENDIX

APPENDIX A

Opinion and Order Entered April 9, 1965.
Dated February 17, 1965

DECISION AND ORDER

On August 13, 1964, the plaintiffs, citizens and residents of the State of Hawaii and qualified voters in their respective senatorial and representative districts, on their own behalf and as a class action on behalf of all other citizens, residents and voters in the State of Hawaii similarly situated, filed this complaint against William S. Richardson, Lieutenant Governor of Hawaii (he being responsible for the supervision of elections), seeking to enjoin Richardson from performing any duties relating to the nomination and election of candidates for State legislative offices unless the State legislature enacted a valid reapportionment plan for use in the 1964 elections, praying that this court should in any event make certain that the 1966 election would be conducted under an apportionment plan that would meet the requirements of the Fourteenth Amendment to the Constitution of the United States.

Plaintiffs alleged that the Constitution of the State of Hawaii apportioned the senate on the basis of geography and not population, and the house of represenatives on the basis of registered voters and not population, and thus the State's scheme of apportionment was unconstitutional under the Fourteenth Amendment, in the light of *Reynolds* v. *Sims*, 377 U.S. 533 (1964), and its companion cases of the same date: *Maryland Committee* v. *Tawes*, *Lucas* v. *Colorado General Assembly*, *Davis* v. *Mann*, *WMCA* v. *Lomenzo* and *Roman* v. *Sincock*.

The Governor of the State, as well as all state legislators, both senators and representatives, filed their appearance as either intervening plaintiffs or defendants. (After the

1964 elections, all but one of the newly elected legislators likewise filed their appearance.)

A three-judge district court thereafter convened, found that it had jurisdiction under 28 U.S.C. Secs. 2201 and 2281 et seq., as well as under the Civil Rights Act, 42 U.S.C. Secs. 1983, 1988, and the court, after full hearing, on August 26, 1964, because of the imminence of the 1964 elections and the disruptive effects which an injunction would have had thereon, and because the State legislature at that date was convened in special session for the specific purpose of considering the problems of reapportionment, denied the motion for a preliminary injunction and set a hearing on the merits for January 11, 1965. (*Cf. Roman* v. *Sincock, supra.*) The legislature failed to agree on any reapportionment plan, and this decision follows the January hearing.

The Constitution of the State of Hawaii, after being hammered out at a Constitutional Convention composed of nonpartisan delegates elected from all parts of the Territory, was adopted July 22, 1950, to become effective immediately upon the admission of Hawaii into the Union as a state. Hawaii was so admitted on August 21, 1959. The Constitution prescribes a senate of 25 members, obviously and admittedly apportioned basically upon the geographical and political divisions of the State, and 51 represenatives apportioned as hereinafter described.

Hawaii is unique in many respects. It is the only state that has been successively an absolute monarchy, a constitutional monarchy, a republic, and then a territory of the United States before its admission as a state. Because each was insulated from the other by wide channels and high seas (*C.A.B.* v. *Island Airlines*, F.Supp. (October 8, 1964)) and historically ruled first by chiefs and then royal governors, after annexation the seven major, inhabited islands of the State were divided up into the four counties of Kauai, Maui, Hawaii and the City and County

of Honolulu.[1] All this resulted in a strongly centralized form of government.

By 1950, Honolulu, the State capital, had by far the largest population of any county, an essentially urban population, and had become an industrial, manufacturing military and tourist center. The other three counties remained essentially rural and primarily concerned with agriculture and ranching. With the State having complete control over the judiciary, taxation, education, public health and welfare, etc., it was normal therefore that the three more rural counties of Kauai, Maui and Hawaii would not wish to leave such centralized power, particularly control over the State's purse strings, with urban Honolulu.

Patterning itself after the makeup of the United States Congress, Article III, Section 2 of the State Constitution apportioned the 25-member senate on a basis which enabled the senators of the three counties outside of Honolulu to have numerical control over that body. This was deliberately done in order to preserve the then nationally approved concept of checks and balances between rural and urban populations.

By Article III, Section 4, the house of representatives was apportioned under "the method of equal proportions," i.e., the same method as used in apportioning the members of the House of Representatives of the United States Congress,[2] giving the representatives from the County of Honolulu, with its larger population, potential control of the house. Both single and multi-member representative districts were set up throughout the State.

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[1] The artificial and isolated County of Kalawao has always been strictly a Hansen's disease treatment area, operated and controlled by the Board of Health of the Territory and State. It votes with Maui County for State Legislators.

[2] Proceedings of the Constitutional Convention of Hawaii, Volume II, (Proceedings), pp. 112-123. See also, *Reynolds* v. *Sims*, *supra*, note 10.

Under this same Section 4, using the method of equal proportions, the State legislators were apportioned among the four "basic areas", viz., the four counties, on the basis of the number of voters registered at the last preceding general election, and within the counties each representative district had its representation determined by the same method.

Under this same Section 4, the governor was mandated to reapportion the members of the house of representatives on or before June 1 of the year 1959, and at successive 10-year intervals thereafter. On May 1, 1959 (pursuant to Public Law 895, 84th Congress, 2nd Session), the Governor of Hawaii did reapportion the State in the above manner, and such reapportionment transferred increasing control to Honolulu.[3]

All parties before this court conceded (as was also determined by the Supreme Court of Hawaii in *Guntert* v. *Richardson*, 47 Hawaii (July 27, 1964)) that Article III, Section 2, relating to the composition and apportionment of the State senate is indisputably invalid under *Reynolds* v. *Sims, supra.*

From the inception therefore, it was obvious that Hawaii's Constitution must be amended, at least to provide for a valid apportionment of its senate. In connection with any constitutional reapportionment of the senate, it must be noted that Article XV (Revision and Amendment), Section 2, para. 6, contains the following proviso:

> ". . . provided, that no constitutional amendment altering this proviso or the representation from any senatorial district in the senate shall become effective unless it shall also be approved by a majority of the

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[3] After the Constitutional Convention, Congress put into permanent effect the reapportionment provisions of the proposed State Constitution. (*Davis* v. *Quinn*, 43 Hawaii 261, 269)

votes tallied upon the question in each of a majority of the counties."

As appears in the Proceedings, pp. 761-64, this proviso was specifically inserted in order to freeze representation in the senate, and it gave to the rural counties what amounted to the right of veto over any attempt to change the representative makeup of the senate. This proviso is so closely tied in with the admittedly invalid scheme of senatorial apportionment that it, too, is likewise constitutionally invalid and falls along with Article III, Section 2.

Plaintiffs urge that Article III, Sections 3 and 4, relating to apportionment of the house, are likewise invalid because they are a part of the total scheme of legislative apportionment, inferring that the house would not have been apportioned as it was but for the senate being apportioned as a built-in check in setting up the "checks and balance" scheme of the United States Congress.

This Court finds that this is not necessarily true. Apart from one problem discussed immediately below, nothing has been called to our attention and we find no evidence—not even in the Proceedings—that the Constitutional Convention would have apportioned the house in any other way than it did.[4]

Plaintiffs urge that in any event, the house of representatives is unconstitutionally apportioned because apportionment thereof is based upon the number of voters registered

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[4] In connection with both the senate and the house of representatives, plaintiffs have claimed that the *number* of legislators in each house, viz., 25 and 51, are part of some invidious scheme. Exhibit 14, Table 14 clearly illustrates that there is no built-in magic or invidiousness in the use of such numbers. The matter of the size of each legislative body and the adoption of a 15-member senate and 31-member house, or a 21-member senate and 41-member house, as well as the ultimately approved 25-member senate and 51-member house were thoroughly explored by the Convention. (Proceedings, pp. 89-101, 112-132)

at the last preceding general election (Art. III, Sec. 4), and not upon a gross, i.e., total population basis.

Article II, Sections 1 and 2, covering suffrage and elections, provides, in substance, that every literate United States Citizen who is compos mentis and not an unpardoned felon, 20 years old or more, residing in the State not less than one year next preceding the election, and a registered voter, shall be qualified to vote. This court finds nothing in Article II which is constitutionally invidious as discriminating against any one on the basis of race, color, creed, employment or geographical location, and as indicated in Article III, Sections 2 and 3, defining who may elect senators and representatives, it appears that the term "qualified voters" is used practically synonymously with registered voters under Article III, Section 4.

This court is not prepared at this time to accept plaintiff's premise that total population is the *only* basis upon which apportionment of state legislatures can constitutionally be based. The Court in *WMCA* v. *Lomenzo, supra,* notes that "New York uses citizen population instead of total population, excluding aliens . . . , for purposes of legislative apportionment" and apparently found nothing invidious in that fact. In *Maryland Committee* v. *Tawes, supra,* The Court said:

> "Rather, the proper, and indeed indispensable, subject for judicial focus in a legislative apportionment controversy is the overall representation accorded to the *State's voters,* in both houses of a bicameral state legislature." (Emphasis added.)

The Court thus re-expressed what it said in *Gray* v. *Sanders,* 372 U. S. 368, 379:

> "Once the geographical unit for which a representative is to be chosen is designated, *all who participate in the election* are to have an equal vote—whatever

> their race, . . . their income, and wherever their home may be in the geographical unit." (Emphasis added.)

The Court has said time after time throughout *Reynolds* v. *Sims, supra,* and the companion cases only that "both houses must be apportioned substantially on a population basis." (Emphasis added.)

Plaintiffs urge and have presented figures showing that on the basis of the 1960, 1962 and 1964 population, the house of representatives is malapportioned. To begin with, paraphrasing *Guntert* v. *Richardson, supra,* 1950 and 1958 registered voters, and 1960, 1962 and 1964 population, are not comparable figures. The Court does not demand that legislatures be reapportioned annually. *Reynolds* v. *Sims, supra,* Subject VIII. This court, at this time, can only determine if the basis of apportionment, when adopted in 1950 and when used for reapportionment in 1959, did in fact at those times result in apportionment "substantially on a population basis."

The Convention tried "to write into this Constitution a proposal that would not deny a single individual in this territory the right to suffrage." (Proceedings, p. 49) The basis of apportionment by population vs. registered voters was thoroughly discussed.

> "The idea among other things was to make the districts as nearly equal population-wise as possible. . ." (Proceedings, p. 107)
>
> . . . .
>
> "One of the reasons why the reapportionment directed by the Organic Act[5] was not carried out was because that act required reapportionment on the basis of citizen population. A breakdown of the population according to this standard has not been locally avail-

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[5] Organic Act, Secs. 60, 62.

able. Total population figures for the territory are shown by census tracts which do not necessarily coincide with locally defined areas. As a practical matter, the number of registered voters was found to bear a reliable and fairly uniform relationship to total population, although it favors slightly the neighbor islands where the percentage of persons who have registered to vote is from one to two per cent higher than for Oahu. It was in recognition of the potential difficulty in obtaining figures which would show citizen population, or figures which would show total population by desirable districts, that the basis for reapportionment of the members of the House was chosen as the number of registered voters." (Proceedings, p. 107).

"The problem as stated in the report and as stated by the committee chairman this morning of using population in these districts is that it is next to impossible to obtain accurate population figures for the districts that we want to use or even for the old precincts or for any districts, unless you should take your representative districts to be the same districts that are used by the Census Bureau. Now it is quite possible that by the next census we could convince the Census Bureau that they should break their areas up into the areas that we may decide upon for representatives.

". . . .[I]n checking this over in the committee we found that there was actually percentage wise or using the method of equal proportions or anything else, very little difference whether we used registered voters, votes cast or population." (Proceedings, p. 124)

The testimony of Robert Schmitt[6] (see Transcript of Proceedings of August 1964 hearings (TR) beginning p. 80) illustrated with certainty that the term "population" as determined by the Census Bureau was far from an accurate or reliable method of determining the true number of *residents* of a given area—at least in Hawaii.

> "The 1960 Census definition of population used in its compilation, ... included all armed forces stationed ashore in Hawaii, regardless of their legal or voting residence. It included all men aboard ships in Hawaii ports on the census date . . . April 1st, 1960; that is [if] a ship tied up in Kapalama Basin or in Pearl Harbor, Ford Island, the entire crew of that ship was assigned to that geographic area.
>
> "This was also true in the case of civilian ships. For example, the Ala Wai Yacht Harbor included a number of house boats and yachts which were enumerated in Hawaii." (TR 80)
>
> ". . . If the person on the night preceding the census had been there . . . each hotel or transient accommodation was enumerated . . . .
>
> "[T]hey enumerated every person in Hawaii at that time, but they then reallocated them to their home states . . . ." (TR 81)

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[6] Robert Schmitt: employed by the Department of Planning and Economic Development of the State of Hawaii; a member of the American Statistical Association; member of the Population Association of America and author of some 60 articles in professional journals; Research Development Analyst in charge of the Research Division of the Honolulu Redevelopment Agency for four years; in charge of research for the Seattle City Planning Commission; author and editor of the Statistical Abstracts of Hawaii; census tract key person for Honolulu of the U. S. Bureau of Census for many years; holds a Master's Degree from the University of Cincinnati, with additional graduate work from the University of Hawaii, University of Michigan and the University of Washington. (Tr. 69-70)

"... We don't know how many were here at that time. *But we made an estimate* .... The Census Bureau did *not* report how many such persons were reallocated." (Emphasis added.) (TR 82)

"... There is no certainty how many were reallocated. We assume that all of them were." (TR 83)

"There were two ships [picked up in the 1960 census], one the Kiwishiwi ... and the other the Black Hawk .... [T]he total personnel of perhaps four hundred ... were assigned to [an area of Waikiki along the Ala Wai Canal] ... [H]ere we had approximately four hundred of the ship's crews ... classified as military ... who were assigned to this [Waikiki] enumeration district. ...

"[I]n 1920 ... they inadvertently threw 3,000 Pearl Harbor people into the ... Honolulu judicial district." (TR 106-07)

"In 1960, the number of members of the Armed Forces ... was either 54,000 or 47,000 ... [or 42,122 if we subtract the 1960 civilian population of 590,650 from 632,772—See Ex. 14, p. 12], the census count was 47,000, and the Department of Defense counted 54,000." (TR. 116)

Since the total civilian population of Hawaii (excluding the military) in 1960 was but 585,505 (Ex. 14, Table 12), it is seen that the military did account for about 10% of the total population. (1960 Census estimate, Ex. 15, Table 9.) Hawaii has become the United States' military bastion for the entire Pacific and the military population in the State fluctuates violently as the Asiatic spots of trouble arise and disappear. If total population were to be the only acceptable criteria upon which legislative representation could be based, in Hawaii, grossly absurd and disastrous results would flow from a blind adherence

to "the elusive 'one-person-one-vote' aphorism." (Mr. Justice Harlan in *Fortson* v. *Toombs*, U.S. , (January 18, 1965.))

For example, if Hawaii's reapportionment year had been 1944, when the civilian population was 464,250 and the military population was 407,000, then areas which normally might have a total population entitling them to but a small percentage of the total number of legislators would suddenly find themselves controlling over 90% of the legislature—for the following ten years!

In contrast to the above, in 1950, with a civilian population of 472,780, there were but 21,000 military in Hawaii—less than 5%. In two years, this had jumped to 55,000. In 1958 there were 55,000 military, with a civilian population of 555,222. Two years later, there were 79,000 military in Hawaii. (Ex. 15, Table 11) As the plaintiffs have admitted, if the State were reapportioned at the present time on a straight total population basis, the *Fifth* senatorial district, containing within its bounds most of the military and naval installations of the State, would be entitled to 13 senators—a majority of the Senate!

A theoretical proposed redistricting of the City and County of Honolulu (Ex. 8) based on total population under the *1960* census, with the primary consideration being substantial equality of *total population*, gave Oahu 20 senators out of 25, and 41 representatives out of 51. (TR 189—Schmitt) A result of such proposed redistricting was that the largest representative district in point of population would be the one that included Schofield Barracks "in fact, it is completely Schofield Barracks," (TR 190) i.e., military population. Although it would thus become the largest representative district in the State, "in point of registered voters [it would be] the smallest district on the island." (TR 191) And Schmitt admitted, in testifying concerning Exhibit 17, that it was possible in a single representative district so reapportioned

on a total population basis, for such a district to have almost no voters at all.

This court does not have before it the problem presented to the Supreme Court of Hawaii in *In Re Robertson, Jr.*, 48 Hawaii (October 30, 1964), viz., the question of whether a service man's residence on a Federal military reservation precludes him from establishing his residence in Hawaii. If he so desires to become a resident of Hawaii, this court can only state that there is nothing in the State Constitution or the Hawaii statutes which per se excludes members of the armed forces from establishing their residence in Hawaii and thereafter becoming eligible to vote. This court finds no scheme in Hawaii's Constitution or in the statutes implementing the exercise of franchise which is aimed at disenfranchising the military or any other group of citizens.

Not only does the fluctuating military population of the State make representation on the basis of total population politically suspect, but the large number of tourists[7] who continually flow in and out of the State and who, as above indicated, for census purposes are initially at least, counted as part of Hawaii's census population (10,000 estimated. 1960 census), would likewise result in gross inequity to citizens of the State eligible to vote, if total population were held to be the only constitutional basis for reapportionment in Hawaii.

The difficulties undoubtedly faced by the Constitutional Convention in determining the best method to set up a system giving equality of representation is further illustrated by references contained in Exhibit 14 on statistics based on the year 1960—not the year 1950 when the Constitution was adopted, or 1959 when the house of repre-

[7] The Hawaii Visitors Bureau statistics show that tourists in Hawaii, for overnight or longer, numbered—in 1950, 46,593; in 1958, 171,588; in 1960, 296,517; in 1962, 362,145; in 1964, 510,000 (preliminary figure).

sentatives was reapportioned. Exhibit 14, Table 1 shows that the total *civilian* population as of July 1st, 1960 was 590,650, with 202,059 registered voters or 34.2% registered. Table 3 shows the *total* population as 632,772, thus indicating but 31.9% of the population as having registered. Table 4, however, shows that out of the State population of 312,478 *United States citizens* (thus including the military) of voting age, the 202,059 registered voters accounts for 64.7% of all that class. Table 5 indicates that out of the *total* population age 20 or over (thus including non-citizens), of 360,193, 231,914 could qualify as being eligible to register. Thus even in 1960, the registered voters actually accounted for 87.1% of all of the possible *voting population* of the State of Hawaii.

That, in Hawaii, apportionment on a registered voter basis is not invidious per se, is further illustrated by Exhibit 14, Table 13, wherein it appears that 19 senators would be apportioned to Honolulu regardless of whether the basis was registered voters in the 1962 election or civilian population. Likewise, there is shown but a difference of two representatives (38-40) for Honolulu in such projected apportionment of the house, a difference which might result from the application of the method of equal proportions.

Hawaii's centralized education system has resulted in an unusually literate citizenry, and interest in politics and strong drives to bring out the vote have resulted in a vote of from 88 to 93.6% of all registered voters during the elections of 1958, 1959,[8] 1960 and 1962. (Ex. 14, p. 12)

Representation based upon those eligible to vote, rather than registered voters, might conceivably have been a better solution, but neither in 1950 nor in 1958, as Schmitt testified (TR 96-98), was there statistical data available from which the necessary figures could have been gleaned

[8] First political implementation under Statehood.

and applied to the representative districts. As he also said, any attempt to determine the number of military personnel or their dependents who are eligible to vote in Hawaii by representative district "would strain the available statistical sources to the breaking point." (TR 98)

This Court does not hold that registered voters as a basis for representation is the perfect basis. Paraphrasing the words of The Court in *Fortson* v. *Dorsey*, U.S. , this court finds the use of registered voters as a basis of apportionment did not, in Hawaii, in fact "designedly or otherwise . . . operate to minimize or cancel out the voting strength of [any] . . . elements of the voting population." (At p.) Nor did it in 1959 bring about that result.

As the records of the Constitutional Convention show (Proceedings 103-111), the districting, both for the senate and the house of representatives, followed along historical, political, geographic and physical lines. There was no gerrymandering in the invidious sense. As Dr. Schmitt testified (TR 96), the representative district lines sometimes cross statistical matters reported in the census, because the census divided up the State into census tracts. While for some of the cities of the State block statistics are available, nevertheless it is rather rare when the census tract coincides with the precinct in an election district. "There seems to have been an unfortunate disregard of precinct boundaries and representative district boundaries in laying out the census tracts and vice versa." (TR 96)

Plaintiffs have pointed to the result of the redistricting in Representative Districts Nos. 1 and 2—Puna and South Hilo on the Island of Hawaii—as proof positive that the districting brought about a result condemne in *Reynolds* v. *Sims, supra*, as unconstitutional, in that in 1959, given a man-average per representative of 3437 voters, Puna with a 1958 registered voter population of but 2209 was given one representative and South Hilo with a registered voter

population of 13,836 was given but three (i.e., 4459 voters per representative)—ergo an arbitrary and invidious dilution of the votes of the South Hilo voters! While The Court did state:

> "It is inconceivable that a state law to the effect that, in counting votes for legislators, the votes of citizens in one part of the State would be multiplied by two, five, or 10, while the votes of person in another area would be counted only at face value, could be constitutionally sustainable",

this broad conclusion, however, was modified a few lines thereafter by the following:

> "Weighting the votes of citizens differently, by any method or means, *merely* because of where they happen to reside, hardly seems justifiable." *Reynolds* v. *Sims, supra.* (Emphasis added.)

As was also stated by Mr. Justice Black in *Colegrove* v. *Green*, 328 U.S. 549, 569-71:

> [T]he constitutionally guaranteed right to vote and the right to have one's vote counted clearly imply the policy that state election systems, no matter what their form, should be *designed* to give *approximately* equal weight to each vote cast . . . ." *Reynolds* v. *Sims, supra,* note 40. (Emphasis added.)

The record of the Proceedings (pp. 139, 141, 157) show that in an endeavor to make all of the representative districts of the State large enough so that the figures would approach the 1950 common denominator of 2445, Puna (1st Representative District), when combined with Keaukaha (now in the 2nd Representative District) came to 2355. The delegates from South Hilo opposed this because geographically Keaukaha was separated from the nearest inhabited portion of Puna by a lava forest over six miles

wide, traversed by but one road. It was an integral part of the City of Hilo, using that city's power, water, police, fire protection, schools and all public services. Its population was almost entirely of Hawaiian extraction; almost all of its inhabitants were employed only in Hilo; and basically, it had no community, ethnic or industrial bond or interest with Puna.

The voting population of Puna, on the other hand, was very predominantly of Japanese extraction, with no urbanization whatsoever, and with almost its entire population employed by one sugar plantation.

Keaukaha had 644 voters. It was recognized that the 1711 voters of Puna ethnically, industrially and socially were a cohesive unit, and such districting, as a matter of practical politics, would have left Keaukaha with *no* real representation.

> "[Keaukaha] was put in Puna in the first place . . . [in] . . . an effort to get a larger number of voters in the district that was going to elect one representative. It should be the natural thing to put it in South Hilo as [the delegates from Hawaii County] propose to do it now and it would not disturb the allocation of voters between Puna and South Hilo, and North Hilo and Hamakua." (Proceedings, p. 157)

As a matter of fact, also, neither in Puna nor in South Hilo did the resultant number of voters per representative, then or in 1959, violate the method of equal proportions. This court finds ample justification for and no invidious vote dilution in the above districting.

As indicated above, this court cannot say that Hawaii's method of districting was part of any invidious scheme to disenfranchise any person or group, or to dilute the vote of any person. In hindsight, this court could say, as did Dr. Schmitt, that for the purpose of determining eligibility

to vote in any precinct or district, it would be far easier to secure some such information if the districting and precinct lines also coincide with the census county divisions and census tracts. (TR 96)

There is nothing which appears in the Proceedings (pp. 173-74) to indicate that the ordering of reapportionment of the house in the year preceding that in which the census is normally taken was part of a scheme to dilute the vote of any person, rather, that year was used because the 5th Legislative Session after the Constitutional Convention would have terminated its work in May 1959. Since reapportionment was based upon registered voters, the census figures did not appear to the delegates to have any application.

Obviously, if the rights of the citizens of Hawaii are to be protected, the Constitution of the State of Hawaii must be amended—and amended before the 1966 general elections. The action of the legislatiure in failing to provide for reapportionment during its special session called for that purpose only last summer was disappointing to this court—and undoubtedly to the Supreme Court of Hawaii. See *Guntert* v. *Richardson, supra.*

As pointed out by the Supreme Court of Hawaii in *Guntert*, any change in the representation from any senatorial district must be by constitutional amendment. This court concurs!

Under Article XV, Section 3 of the Hawaii Constitution, while the legislature may propose amendments to the Constitution, such amendments can only be voted on at a general election. If the legislature at its special reapportionment session of 1964 had proposed any reapportionment amendment, it could have been voted on in the 1964 election, but that legislature did not so act. Having determined that the senate at least, must be reapportioned before the 1966 general election, this court, in the inception, is now

compelled to attempt to achieve that result by following the constitutional method provided under Article XV, Section 2. In the event that the constitutional route fails or, if followed, produced an invalid scheme of apportionment, only then would this or any other court be justified in attempting to assume the Herculean task of devising and enforcing a temporary reapportionment system.

In the event that a Constitutional Convention is convened, then in view of the questions and problems which have been raised before this court in this case, as well as before the Supreme Court of Hawaii in *Guntert* v. *Richardson, supra*, the delegates, in addition to providing for reapportionment of the senate, may also wish to reconsider the question of:

1. Whether it will continue to use registered voters as the apportionment basis, or change it to State citizen population eligible to vote (i.e., voter population), or citizen population, or total population.

2. Whether it is better to have one or both houses of the legislature composed of single member representative districts, or to have and justify[9] one or both houses composed, in whole or in part, of multi-member or floterial districts.

3. Whether decennial reapportionment of either or both houses should be made on or before June 1st of the year preceding the Federal census—as is now the case—or on a date soon after the taking of such census.

4. Whether the representative district lines should remain substantially as they now are or whether ultimately (i.e., after 1970) there should be redistricting in such a manner that the census tracts and representative districts can be coordinated for the statistical purposes necessary to implement the changes (if any) made in the basis of apportionment.

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[9] Butcher v. Bloom, 203 A. 2d 556, 572-73.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

1. Those provisions of Article III, Section 2 of the Constitution of the State of Hawaii fixing the number of senators per senatorial district are hereby declared unconstitutional and invalid. The remainder of Article III of said constitution is declared constitutional and valid.

2. The proviso at the end of the sixth paragraph in Section 2 of Article XV pertaining to amendments affecting representation in the Senate is hereby declared unconconstitutional and invalid. The remainder of Article XV is declared constitutional and valid.

3. The plaintiffs and intervening plaintiffs have failed to prove that the apportionment of the House of Representatives of the Legislature of the State of Hawaii causes any invidious discrimination in the weight of their vote or that such apportionment is the result of arbitrary or capricious action. Their prayers for relief in this respect are therefore denied.

4. This court will not interfere with the convening or conducting of the business of the Third State Legislature in regular session in 1965, save and except that the parties herein are hereby enjoined from taking final action upon any legislation, except such actions as are necessary to organize the respective houses at such session and appropriate funds for the session, until legislation, pursuant to the provisions of Article XV of said Constitution providing for the submission to the people of Hawaii, by special election to be held not later than August 1, 1965, the question: "Shall there be a convention to propose a revision of or amendments to the constitution? ", and for any and all acts required by law to implement such legislation, has been enacted into law. Such legislation shall also provide that if the vote be in the constitutional affirmative, then a special election shall be held not later than September 15, 1965 to elect delegates to the convention in the manner provided in the Constitution. Such legislation may include legislative action under Article XV, Section 2, 4th para-

graph, of the Constitution. Such legislation shall further provide that the convention convene not later than October 15, 1965 and that it conclude its deliberation in time to submit its proposed constitutional amendments to the electorate of Hawaii at a special election to be held not later than January 30, 1966, including (but not limiting the convention thereto) provisions therein for reapportioning the Senate of Hawaii on a constitutionally valid basis. Such legislation shall also appropriate and make available funds for the expenses of such elections and convention.

5. The offices of all senators of the Hawaii State Senate are hereby declared vacant as of the day of the general election of 1966. Until such date, the existing offices of all senators elected under Article III, Section 2 of the Constitution, shall be valid.

6. This court retains jurisdiction of this action for all purposes, including but not limited to (a) considering such sanctions as may be appropriate if the orders of this court are not carried out; (b) judicially reapportioning the Senate in the event that the electors of Hawaii reject a constitutional convention, or the convention fails to propose an amendment reapportioning the Senate, or the electors reject such an amendment, or if any amendment of the convention does not insure the apportionment of the Hawaii State Legislature in accordance with the requirements of the Equal Protection Clause of the 14th Amendment to the Constitution of the United States.

7. All other relief prayed for in the Complaint, Complaint in Intervention, and Cross Complaint is hereby denied.

DATED: Honolulu, Hawaii, this 17th day of February, 1965.

GILBERT H. JERTBERG
Circuit Judge

WILLIAM T. BEEKS
District Judge

MARTIN PENCE
District Judge

APPENDIX B

Order of March 19, 1965

FINAL ORDER ON MOTION TO ALTER OR AMEND JUDGMENT

As stated in this court's Decision and Order of February 17, 1965, a plan reapportioning the Senate of Hawaii must be operative for the 1966 general election, and this court did not in February and does not now wish to assume the task of devising a reapportionment scheme. Faced with the legislature's failure to act during its special reapportionment session of 1964, this court then felt compelled to channel reapportionment measures into the constitutional convention route.

Based upon the current actions of the legislators, followed by the representations by counsel for all parties to this suit that all are in accord with the objectives outlined in the motion to alter or amend judgment, this court is now convinced that the legislative climate has changed and that the legislators presently in session are now prepared to undertake the formulation of a plan for reapportioning the Senate which can be Constitutionally justified. From the representations made, this court is satisfied that the multiple and accelerated special elections and a constitutional convention would cost well over $1,000,000, strain the State's election machinery, and force an as-yet-unsought-for constitutional convention upon the people of Hawaii, with attendant loss of time to the delegates.

This court is therefore prepared to grant the motion of intervenor-defendants Nelson K. Doi et al., and Elmer F. Cravalho et al., to alter the court's Decision and Order of February 17, 1965.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that this court's order of February 17, 1965 be and is hereby altered in the following particulars. Item 4 beginning at the bottom of page 19, and item 6 beginning at the bottom of page 20, are amended to read as follows:

"4. The Senate shall be apportioned on the basis of the number of voters registered at the 1964 general election

substantially in the manner outlined by the reapportionment plan for the Senate, set forth in Senate Concurrent Resolution No. 35, adopted by the Legislature of the State of Hawaii on March 1, 1965, and attached to the Motion to Alter or Amend Judgment filed in this court on March 1, 1965. Any such reapportionment plan shall apply to the 1966 elections and thereafter until an appropriate and legal constitutional amendment shall become effective.

"In furtherance of the above, the legislators and parties herein are enjoined from taking final action upon any legislation except such actions as are necessary to organize the respective houses at such session and appropriate funds for the session, until the State legislature in regular session in 1965:

> "(a) shall have enacted a reapportionment and redistricting plan for the Senate on the basis of 1964 registered voters (and applicable to the 1966 elections) and the same shall have become law;
>
> "(b) shall have adopted a proposed constitutional amendment embodying pertinent provisions of the foregoing reapportionment and redistricting plan, to be presented to the electorate for ratification at the 1966 general election, in the manner provided by Article XV, Section 3, of the State Constitution; and
>
> "(c) shall have enacted legislation, pursuant to the provisions of Article XV of the State Constitution, providing for submission to the people of Hawaii at the general election of 1966 the question: 'Shall there be a convention to propose a revision of or amendments to the Constitution?'."

"After (a), (b) and (c) shall have been enacted and adopted, and made operative, the same shall thereupon be submitted to this court for approval.

"If the measures set forth in paragraphs (a), (b), and (c) above shall not have been enacted and adopted by the

legislature on or before the twentieth calendar day following the date of the order granting the motion to amend the said Decision and Order, and made operative, and if the same after hearing shall not have been approved by the court, then, as far as then and thereafter applicable, item 4 on pages 19 and 20 and item 6 on pages 20 and 21 of the Decision and Order dated February 17, 1965 shall become automatically reinstated and thereafter remain in full force and effect as if the Motion to Amend the same had not been granted.

• • • •

"6. This court retains jurisdiction of this action for all purposes, including but not limited to:

"(a) considering such sanctions as may be appropriate if the orders of this court are not carried out; and

"(b) judicially reapportioning and redistricting the Senate, in the event that the obligations of the parties above indicated are not fulfilled, or any reapportionment plan so enacted is not approved by the court, or the electors of Hawaii at the 1966 general election reject the proposed and court-approved constitutional amendment reapportioning the Senate, or under any other circumstances which this court shall deem appropriate."

In all other respects this court's Decision and Order of February 17, 1965 is reaffirmed.

Dated: Honolulu, Hawaii, this 9th day of March, 1965.

GILBERT H. JERTBERG
District Judge

WILLIAM T. BEEKS
District Judge

MARTIN PENCE
District Judge

APPENDIX C

Opinion and Order of April 28, 1965

DECISION AND ORDER ON HAWAII'S SENATE REAPPORTIONMENT PLAN OF APRIL 14, 1965

This court has now before it the Hawaii State Legislature's H. B. No. 987, S.D. 1, C.D. 1; H. B. No. 773, S.D. 1, C.D. 1; and H.B. No. 986, setting forth that body's response to this court's order of March 9, 1965, viz., presenting (a) a plan for the provisional reapportionment of the Senate on the basis of the voters registered for the 1964 general election; (b) a proposed constitutional amendment encompassing the same plan; and (c) a submission to the electorate in 1966 of the question of calling a constitutional convention.

The road by which the above bills reached this court is tortuous. In August of 1964, when this court first heard this case, the Legislature of Hawaii was then sitting in special session called by the Governor of Hawaii for the specific purpose of attempting to devise a scheme of legislative reapportionment which would be constitutionally valid. The legislature at that session failed to agree on any reapportionment plan. After a hearing in January 1965, this court, on February 17, 1965, found that Article III, Section 2, of the Hawaii State Constitution fixing the number of senators per senatorial district, as well as the proviso at the end of the sixth paragraph in Section 2 of Article XV of the constitution, were invalid, "determined that the Senate *at least* must be reapportioned before the 1966 general election," and enjoined the Third State Legislature in its regular 1965 session from passing any but preliminary "housekeeping" acts until it had set up the machinery for the convening of a constitutional convention to amend the State's legislative scheme of apportionment before the 1966 election. (Emphasis added.)

On March 1st, 1965, the legislature, then convened in regular session, requested this court to alter its order of February 17th so as to permit the legislature itself during that session to pass legislation:

(a) enacting a provisional plan for reapportioning the senate on the basis of the 1964 registered voters, to be effective for the 1966 election and until a constitutional amendment on reapportionment had been adopted by the people of Hawaii as provided in the constitution;

(b) adopting a proposed constitutional amendment embodying pertinent provisions of the foregoing reapportionment plan to be presented to the electorate for ratification at the 1966 general election; and

(c) submitting to the electorate at that 1966 election the question, under Article XV of the State constitution: Shall there be a convention to propose a revision of or amendments to the constitution?

Counsel for all parties to the suit were in accord with the objectives outlined in the motion, and this court was satisfied from the representations made that the constitutional convention route prescribed by its February 17th order would be very expensive and perforce would demand the devotion of great time and effort from the people of Hawaii. The court, then, also believed that the legislators, each and all, would recognize their obligations to the entire electorate of Hawaii, would rise above any possible self-interest, would heed the admonitions of the Attorney General, and would certainly note the flashing red lights of the caveats set out in this court's order of February 17th, viz., that a constitutional convention *in addition* to providing for reapportionment of the senate might also consider (1) whether the registered voter population should continue to be used as the basis for apportionment, or some other type of population basis should be adopted; (2) "whether it is better to have one or both houses of the legislature composed of single member representative dis-

tricts, or to have and *justify*[9] one or both houses composed in whole or in part, of multimember or floterial districts. (Note) 9 *Butcher* v. *Bloom*, 203 A.2d 556, 572-73" (emphasis added); (3) whether there should be a change in the date of decennial reapportionment; and (4) whether there should be redistricting of the representative districts.

This court therefore, by order of March 9, 1965, altered its February 17th order to permit the legislature (a) to enact a provisional reapportionment and redistricting plan for the senate; (b) to adopt "a proposed constitutional amendment embodying *pertinent* provisions of the foregoing reapportionment and redistricting plan" for submission to the electorate at the 1966 general election (emphasis added); (c) to enact legislation to submit to the electorate the question: Shall there be a convention to propose a revision of or amendments to the constitution? This order, like the one of February 17th, demanded that the plan be approved by this court; failing approval, the order of February 17th demanding legislation for implementing a constitutional convention would again become effective.

On March 18th this court was advised that a provisional plan, in substance approved by both houses, was then in conference committee and about ready to be presented to this court, whereby the senate was reapportioned by dividing the State into the same original six senatorial districts, changing only the number of senators allocated to each district, based upon the use of the method of equal proportion. By that March 18th plan, two senators were apportioned to the first senatorial district—East Hawaii; one to the second—West Hawaii; two to the third—Maui; nine to the fourth—Southern Oahu; ten to the fifth—the remainder of Oahu; and one to the sixth—Kauai.

The legislature quickly thereafter was informally made to understand that such a grossly lumpy apportionment of senators, whereby forty per cent of the entire senate would

come from one senatorial district and thirty-six per cent from another alongside, could never be approved, and the plan was forthwith withdrawn from conference committee for reconsideration by the house of representatives. Shortly thereafter, this court flashed an even brighter red light on its caveat number (2) above by informally indicating that because Hawaii had a multi-member district house, any other than single member senatorial districting would have to be justified to this court.

On April 14th, 1965, the legislature passed and sent to this court the numbered bills identified *supra:*

A. H.B. 987, its proposed provisional senatorial reapportionment plan; H.B. 773, its proposed constitutional amendment embodying that same plan; and H.B. 986, submitting to the electorate in the 1966 general election the question of the calling of a constitutional convention. By H.B. 987, the State was divided into eight senatorial districts, viz.:

County	Senatorial District	No. of Senators	1964 Registered Voters per District
Hawaii	First	3	28,130
Maui	Second	2	18,786
Honolulu	Third	3	27,073
Honolulu	Fourth	4	35,780
Honolulu	Fifth	4	39,361
Honolulu	Sixth	4	40,629
Honolulu	Seventh	4	37,336
Kauai	Eighth	1	12,266

B. Exhibits A and B, attached to the plan, the same being the reports of the conference committee on the proposed provisional plan (H.B. 987), as well as the proposed plan for the constitutional amendment (H.B. 773) embodying the same, setting forth the conference committee's "justification" for wholly abandoning any attempt to redistrict the senate on a single member district basis.

Senate exhibits Nos. 5 and 6 (maps also filed), outlined the geographical boundaries of the respective senatorial districts of Honolulu.

The court would agree that the number of registered voters per senatorial district and apportioned to the four basic areas, viz., three to the County of Hawaii, two to the County of Maui, nineteen to the City and County of Honolulu, and one to the County of Kauai, conforms to the standards required under the method of equal proportions prescribed by the Constitution of the State of Hawaii and thus meets that one test of constitutionality. *Roman* v. *Sincock*, 377 U.S. 695 (1964); *Reynolds* v. *Sims*, 377 U.S. 533 (1964).

In the attached committee reports, the reasons given, i.e., "justification", for choosing multi-member districts of three and four senators per district were substantially: (1) single-member districts would tend to cause the senators therefrom to be concerned with localized issues and ignore the broader issues facing the State, and therefore it might fragment the approach to state-wide problems and programs to the detriment of the State; (2) historically the members of the house had represented smaller constituencies than members of the senate, and tradition and experience had proved that balance desirable; (3) multi-member districts would increase the significance of an individual's vote by focusing his attention on the broad spectrum of major community problems as opposed to those of more limited and local concern; (4) to set up single-member districts would compound the more technical and more intricate problem of drawing the boundaries; (5) population shifts would more drastically affect the boundaries of many smaller single-member districts—to a greater degree than would be found in larger multi-member districts, citing Oahu's population boom and subdivision development.

In drawing the district lines the legislature reported that it "relied very heavily" on the standards of compact-

ness and contiguity— "geographical separation and long-established representative precinct lines."

Except for the slightly misleading conclusion that the third senatorial district was *primarily* a suburban area, and that the fourth senatorial district was composed of substantially plantation and suburban communities, from the report it appears that no other criteria, save number of registered voters, geographical boundaries and historical representative district lines were considered or used in forming the plan. Apparently, ethnic, political, industrial, economic, social, occupational factors, and community of interests and problems were given little if any consideration by the legislature.

The testimony of Senator Sakai Takahashi, chairman of the conference committee, at the April 15, 1965 hearing on the plan, summed up the legislature's underlying raison d'etre with his statement: "We thought it fair."

Mr. Robert Schmitt, statistician, who had testified at length in the hearing of August, 1964, again a witness, testified in favor of applying the law of large numbers, viz., that smaller areas with small numbers fluctuate in much greater proportion than do larger areas with larger numbers, to senatorial districts. He, however, had *not been consulted* on the problem of the multi-member districts vs. single-member, or the problem of district lines.[1]

In analyzing the plan, all Mr. Schmitt could say for the third senatorial district was that it had excellent statistical

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[1] In its (unsubmitted) plan of March 18th, *supra* p. 4, two senators were to be elected from East Hawaii, and one senator from West Hawaii. The total registered voters in 1964 in East Hawaii was 20,770, and in West Hawaii was 7,360. In the present provisional plan, this division of the Island of Hawaii was dropped and three senators were to be elected from the first senatorial district, which would now include the entire island. Of the seven senators presently elected from districts one and two, five live within a short distance of each other in Hilo, in East Hawaii.

boundaries.[2] It was logical to deduce from his testimony that the boundary between the fourth and fifth senatorial districts had accidentally resulted in an excellent *line of division,* in that it separated the military area, i.e., military housing, etc., from the city proper. The best that he could say, however, for the line between the fifth and sixth senatorial districts was that it neatly separated the central business district from residential areas alongside. The line between the sixth and seventh senatorial districts was historical.

Mr. Schmitt, in contradistinction to the conference committee, found it necessary to analyze the representative districts and criticized many of them as being far too small, e.g., the first—on Hawaii, the thirteenth—Kalihi, on Oahu; or much too large, e.g., the fifteenth—with its six representatives. Schmitt pointed out that within the fifteenth district, in the Moiliili area, there was a higher proportion of persons of Japanese ancestry than in any census tract of the island, yet Waikiki, primarily concerned with tourist service, was the second highest among census tracts in percentage of Caucasian residents. Also, high-level professional, technical and managerial people tended to live in Waikiki or upper Manoa,[3] whereas operatives, laborers, clerical workers, middle and lower-middle income people lived in the central (Moiliili, etc.) area.

Mr. Schmitt stated that the fifth senatorial district likewise encompassed a highly heterogeneous area containing a multitude of Caucasian widows in the uplands area, and an overabundance of Filipino males in the seaward portion of the district. The twelfth representative district, therein, had a very high proportion of persons of foreign birth or Asiatic ancestry, of the lower-middle socio-eco-

[2] The location of the residences of two of Honolulu's present total of ten senators is in this district.

[3] The residences of the three senators from the present fourth senatorial district showed that all lived only a very short distance apart in the upper Manoa area of the sixteenth representative district.

nomic group.[4] Schmitt's only other comment regarding the fifth senatorial district was that the boundary between the twelfth and thirteenth representative districts, i.e., within the proposed fifth senatorial district, had a very unfortunate location.

Schmitt also pointed out that within the seventh senatorial district were two clearly defined and geographically, economically and socially divided groups. In Palolo in the seventeenth representative district area were found the lower socio-economic laborers, operatives, and clerical workers, and in the Waialae-Kahala and Aina Haina areas were the highly professional and managerial class. In the latter area the median annual family income in 1959 was almost $16,000, whereas in Palolo it was $3,000.

From the committee reports and the testimony of Senator Takahashi, it is obvious that the legislature gave sparse, if any, consideration of any of the facts or factors pointed out by Mr. Schmitt, in devising its scheme of multi-member senatorial districts for Oahu.

Although we initially determined that the house of representatives was not unconstitutionally apportioned, by that decision we did not say that those representative districts had been perfectly laid out. We agree with Mr. Schmitt that, compared to the makeup of all other representative districts in the State, the sixteenth is too large.

There can be no truly representative government without a system of apportionment which provides potentially equal representation to the divergent factors incorporated within the body politic. Our own representative form of government demands checks and balances, devices and procedures to channel the many and diverst interests of the people into the making of a stream of legislation that produces for each person in that state the maximum beneficence

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[4] Similarly, three senators from the fifth district likewise lived a short distance from each other in the twelfth representative district.

possible. Methods of securing this desired objective were pointed out in *Reynolds* v. *Sims, supra,* at 576-77:

> "Different constituencies can be represented in the two houses. One body could be composed of single-member districts while the other could have at least some multimember districts. The length of terms of the legislators in the separate bodies could differ. The numerical size of the two bodies could be made to differ, even significantly, and the geographical size of districts from which legislators are elected could also be made to differ. And apportionment in one house could be arranged so as to balance off minor inequities in the representation of certain areas in the other house. In summary, these and other factors could be, and are presently in many States, utilized to engender differing complexions and collective attitudes in the two bodies of a state legislature, although both are apportioned substantially on a population basis."

In reapportioning and redistricting the senate, both houses overlooked the fact that, to be valid, the makeup of the senate must positively complement the makeup of the house, to provide the vital equality of voter representation. Both houses of the legislature seemingly forgot that the schemes of districting *each* house, when conjoined, must offer compensating advantages to the voters—not only to those voters within each representative district, be it senate or house, but to all voters throughout the State. While there perforce must be some overlap of representation with the several senate and house districts, that overlap must not be such as to concentrate and intensify the voting power of a single senatorial-representative district to the point that the voters therein have a built-in disproportionate representational advantage over any other voters of the State.

If the achievement of this goal is even to be approached, there should not be any monolithic political units of rep-

resentation in that all-inclusive system of apportionment. Unless, within any single geographically defined political area or unit, there is a meaningful and substantial difference in the composition of that body of electors therein, whose combined votes elect a senator, from that body whose combined votes elect a member of the house, then the demanded differing complexions and collective attitudes are lost, the necessary cross checking and resulting balance is absent, and the majorities therein are given a disproportional monolithic command, not only within the narrow political unit, but also within the legislative bodies. Such artificially concentrated political power negates any notion of equality of representation for the minorities entrapped therein, as well as for all other electors of the State outside such a monolithic political unit.

> "However complicated or sophisticated an apportionment scheme might be, it cannot, consistent with the Equal Protection Clause, result in a significant undervaluation of the weight of the votes of certain of a State's citizens merely because of where they happen to reside." *WMCA* v. *Lomenzo,* 377 U.S. 633, 653.

The Hawaiian legislature, whether innocently or designedly, has, nevertheless, built just such monoliths into its reapportionment scheme.

In its effort to achieve its objective of multi-member (three and four) senatorial districts in Honolulu, the legislature made the boundaries of the third senatorial district and the eighth representative district one and the same. Thus from *one* political and geographical unit would be elected four representatives and three senators—seven members of the legislature all responsible to and representing exactly the same constituency! Similarly, the sixth senatorial district was fashioned almost entitrely from the fifteenth representative district, with the result that from the fifteenth representative unit, i.e., from the dominant three-fourths of the voting population of that senatorial

district, would come six representatives and four senators. (31,302 of the senatorial district's total of 40,629 voters reside in the fifteenth representative district.)

While it is a fundamental factor under the decisions of The Court, population is not the sole definitive measure for setting up either representative or senatorial districts. Compactness and contiguity of the territory are admittedly also factors, but community of interests, community of problems, socio-economic status, political and racial factors—each and all must be considered, and not only must the electorial districts be laid out with the totality of those factors having been taken into consideration, but even more, the sum total of all of the districting must result in substantial equality of meaningful representation to each and all the voters of the State. "(A)ll who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income and wherever their home may be in that geographical unit." *Gray* v. *Sanders*, 372 U.S. 368, 379. As indicated, not only was there no totality of consideration of the above factors in setting up the senatorial districts on Oahu, but there was even less totality of consideration of the factors of equal representation to all voters on Oahu and the rest of the State.

Here, the realistic political weight of the voters in both the third and sixth senatorial districts would far exceed the political weight of any voter in any other district, not only in Honolulu but in any other county of the State. It is patent to the court that both the house and the senate, in setting up the senatorial plan either failed or refused to recognize the effect that such a plan would have upon the basis for representation of the entire voting population. Both the Hawaiian senate and house ignored the admonition of the Supreme Court:

> "(I)n reviewing a state legislative apportionment case this court must of necessity consider the challenged

scheme *as a whole* in determining whether the particular State's apportionment plan, in its entirety, meets federal constitutional requisites. It is simply impossible to decide upon the validity of the apportionment of one house of a bicameral legislature in the abstract, without also evaluating the actual scheme of representation employed with respect to the other house. Rather, the proper, and indeed indispensable, subject for judicial focus in a legislative apportionment controversy is the overall representation accorded to the State's voters, in both houses of a bicameral state legislature." *Maryland Committee* v. *Tawes*, 377 U.S. 656, 673. (Emphasis added.)

This court heretofore said that the house was not unconstitutionally apportioned. This court indicated the means by which the senate could be apportioned to give to every voter the equal protection and equal representation that he is entitled to without disturbing the makeup of the house, but because both houses failed to look at the political scene in its totality and instead of viewed the reapportionment scheme of the senate as if it were something that could be fashioned without consideration of its tight juxtaposition to the house of representatives, each house of the legislature jointly and separately took such a myopic view of the political problem involved, that they failed to see and anticipate the overall result of arbitrarily joining their independently constructed senatorial plan with the existing representative scheme.[5] As indicated, both houses failed to heed the words of the Supreme Court, as well as any of the red lights this court had flashed. Both houses failed to heed the advice of the Attorney General of the State

[5] As foretold in *Fortson* v. *Dorsey*, 379 U. S. .... (1965) "it might well be that, designedly or otherwise, a multi-member constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population."

of Hawaii, and the end result, based as it is upon reasons which fall very, very short of justifying the resultant multi-member districting of both houses, fails to give to each and every voter of the State of Hawaii the fundamental equality of representation to which each is entitled under the Fourteenth Amendment.

Even if the above, alone, were not enough to render the proposed scheme invalid, it is manifest to this court that the legislature's adamant insistence on three and four-member senatorial districting was the conscious or unconscious—though not unnatural—reluctance of the affected senators to carve out single-member districts which thereafter would in all probability result in a political duel-to-the-death with a fellow and neighbor senator. To have cross-cut any of Honolulu's eighth, twelfth or fifteenth representative districts in order to mark out single-member senatorial districts would, with practical certainty, have left two or three present incumbents to complete [sic] head on for a single senatorial seat.

Likewise, the shift on Hawaii from the double, 2-1 senator district scheme, tentatively adopted on March 18th, to the single 3-senator district in the instant plan, was an unmistakable application to East Hawaii's incumbent senators of that same factor of political self-preservation implanted into the Honolulu districting scheme.[6]

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[6] "(I)n the absence of any reasonable justification (historical or otherwise), such districting (creation of single-member and multi-member districts) might be the result of gerrymandering for partisan advantage and, in that event, would be arbitrary and capricious. In the light of the constitutional pitfalls inherent in such a districting scheme, it would be more prudent to approach the matter of apportionment by setting up single-member districts unless valid and compelling reasons exist which require the creation of some multi-member districts." *Butcher* v. *Bloom*, 203 A. 2d 556, 573.

This court finds that the present multi-member district scheme of senatorial reapportionment resulted, in a material part at least, from gerrymandering.

We find the proposed plan does not meet the test of equality of representation set down by our Supreme Court and is invalid. We therefore do not approve the plan.

Circuitous or expensive as it may be, the route set out by the Constitution of this State, viz., by way of a constitutional convention, must now be followed. Inasmuch as the plan set forth in H.B. 987 cannot be and is not approved by this court, IT IS THEREFORE ORDERED:

(1) The stay order of this court dated April 19, 1965, is rescinded, effective forthwith; and

(2) As indicated in our Final Order of March 19, 1965, item 4 on pages 19-20, and item 6 on pages 20-21 of the Decision and Order of this court dated February 17, 1965, be and they are hereby automatically reinstated and now remain and shall continue in full force and effect until further order of this court.

As may be noted, this court has not herein discussed H.B. 773. We are advised that it was able to pass the senate by but the barest majority, 13-12, far short of the two-thirds demanded by the State constitution for the adoption of a proposed constitutional amendment. The same also has not yet lain on the desk of the Governor for the ten days prior to final adoption, as provided by the constitution.[7] Therefore, procedurally, the same has not yet been

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[7] In order to move the reapportionment problem with the greatest celerity, this court, nevertheless, had advised all parties that a provisional plan of reapportionment could be submitted to this court and a hearing had thereon immediately after the same was passed by the legislature and before the ten-day period during which a proposed amendment must lie on the desk of the Governor before the same can be adopted and passed. The instant hearing therefore was solely upon the matter of the proposed provisional plan.

submitted to us. *Wright* v. *Rockefeller,* 376 U.S. 52, 58. Even if it were, nevertheless, in view of our decision on the provisional plan, H.B. 987, we would not and now do not find it necessary to consider the validity of the proposed amendment, H.B. 773, or the question proposed by H.B. 986.

This court continues to retain jurisdiction of this action for all purposes.

This decision shall take effect forthwith.

Dated: Honolulu, Hawaii, this 28th day of April, 1965.

GILBERT H. JERTBERG
Circuit Judge

WILLIAM T. BEEKS
District Judge

MARTIN PENCE
District Judge

APPENDIX D

Constitutional and Statutory Provisions

1. U. S. Constitution, Amendment XIV, Section 1

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Article III of the Constitution of the State of Hawaii

THE LEGISLATURE

SECTION 1. The legislative power of the State shall be vested in a legislature, which shall consist of two houses, a senate and a house of representatives. Such power shall extend to all rightful subjects of legislation not inconsistent with this constitution or the Constitution of the United States.

SECTION 2. The senate shall be composed of twenty-five members, who shall be elected by the qualified voters of the respective senatorial districts. The districts, and the number of senators to be elected from each, shall be as follows:

First senatorial district: that portion of the island of Hawaii known as Puna, Hilo and Hamakua, five;

Second senatorial district: that portion of the island of Hawaii known as Kau, Kona and Kohala, two;

Third senatorial district: the islands of Maui, Molokai, Lanai and Kahoolawe, five;

Fourth senatorial district: that portion of the island of Oahu lying east and south of Nuuanu Street and Pali Road and the upper ridge of the Koolau Range from the Nuuanu

Pali to Makapuu Point and all other islands not specifically enumerated, five;

Fifth senatorial district: that portion of the island of Oahu lying west and north of the fourth senatorial district, five; and

Sixth senatorial district: the islands of Kauai and Niihau, three.

SECTION 3. The house of representatives shall be composed of fifty-one members, who shall be elected by the qualified voters of the respective representative districts. Until the next reapportionment, the representative districts and the number of representatives to be elected from each shall be as set forth in the Schedule.

SECTION 4. On or before June 1 of the year 1959, and of each tenth year thereafter, the governor shall reapportion the members of the house of reprsentatives in the following manner: The total number of representatives shall first be reapportioned among four basic areas, namely, (1) the island of Hawaii, (2) the islands of Maui, Molokai, Lanai and Kahoolawe, (3) the island of Oahu and all other islands not specifically enumerated, and (4) the islands of Kauai and Niihau, on the basis of the number of voters registered at the last preceding general election in each of such basic areas and computed by the method known as the method of equal proportions, no basic area to receive less than one member. Upon the determination of the total number of representatives to which each basic area is entitled, such total shall be reapportioned among the one or more representative districts within each basic area on the basis of the number of voters registered at the last preceding general election within each of such representative districts and computed by the method known as the method of equal proportions, no representative district to receive less than one member. Upon any reapportionment, should the total number of voters registered in any representative

district be less than one-half of the quotient obtained by dividing the total number of voters registered in the State by the total number of members to which the house is entitled, then, as part of such reapportionment, the basic area within which such representative district lies shall be redistricted by the governor in such manner that the total number of voters registered in each new representative district therein shall be more than one-half of such quotient.

The governor shall thereupon issue a proclamation showing the results of such reapportionment, and such reapportionment shall be effective for the election of members to such house for the next five succeeding legislatures.

Original jurisdiction is hereby vested in the supreme court of the State to be exercised on the application of any registered voter, made within thirty days following the date specified above, to compel, by mandamus or otherwise, the governor to perform the above duty; and made within thirty days following the date of such proclamation, to compel, by mandamus or otherwise, the correction of any error made in such reapportionment.

SECTION 5. The members of the legislature shall be elected at general elections. The term of office of members of the house of representatives shall be two years beginning with their election and ending on the day of the next general election, and the term of office of members of the senate shall be four years beginning with their election and ending on the day of the second general election after their election.

* * *

SECTION 11. Regular sessions of the legislature shall be held annually. The governor may convene the legislature, or the senate alone, in special session. All sessions shall be held at the capital of the State. In case the capital shall be unsafe, the governor may direct that any session shall be held at some other place. Regular sessions in odd numbered years shall be known as "general sessions" and

regular sessions in even numbered years shall be known as "budget sessions".

* * *

Regular sessions shall commence at 10:00 o'clock a.m., on the third Wednesday in February. General sessions shall be limited to a period of sixty days and budget sessions and special sessions to a period of thirty days, but the governor may extend any session for not more than thirty days. Sundays and holidays shall be excluded in computing the number of days of any session.

3. Article XV of the Constitution of the State of Hawaii

REVISION AND AMENDMENT

SECTION 1. Revisions of or amendments to this constitution may be proposed by constitutional convention or by the legislature.

SECTION 2. The legislature may submit to the electorate at any general or special election the question, "Shall there be a convention to propose a revision of or amendments to the Constitution?" If any ten-year period shall elapse during which the question shall not have been submitted, the lieutenant governor shall certify the question, to be voted on at the first general election following the expiration of such period.

If a majority of the ballots cast upon such question be in the affirmative, delegates to the convention shall be chosen at the next regular election unless the legislature shall provide for the election of delegates at a special election.

Notwithstanding any provision in this constitution to the contrary, other than Section 3 of Article XIV, any qualified voter of the district concerned shall be eligible to membership in the convention.

Unless the legislature shall otherwise provide, there shall be the same number of delegates to such convention, who

shall be elected from the same areas, and the convention shall be convened in the same manner, as nearly as practicable, as required for the Hawaii State Constitutional Convention of 1950.

The convention shall determine its own organization and rules of procedure. It shall be the sole judge of the elections, returns and qualifications of its members and, by a two-thirds vote, may suspend or remove any member for cause. The governor shall fill any vacancy by appointment of a qualified voter from the district concerned.

The convention shall provide for the time and manner in which the proposed constitutional revision or amendments shall be submitted to a vote of the electorate, but no such revision or amendments shall be effective unless approved at a general election by a majority of all of the votes tallied upon the question, such majority constituting at least thirty-five percent of the total vote cast at such election, or at a special election by a majority of the total vote tallied upon such question, such majority constituting at least thirty-five percent of the total number of registered voters; provided, that no constitutional amendment altering this proviso or the representation from any senatorial district in the senate shall become effective unless it shall also be approved by a majority of the votes tallied upon the question in each of a majority of the counties.

The provisions of this section shall be self-executing, but the legislature shall make the necessary appropriations and may enact legislation to facilitate their operation.

Section 3. The legislature may propose amendments to the constitution by adopting the same, in the manner required for legislation, by a two-thirds vote of each house on final reading at any session, after either or both houses shall have given the governor at least ten days' written notice of the final form of the proposed amendment, or, with or without such notice, by a majority vote of each house on final reading at each of two successive sessions.

Upon such adoption, the proposed amendments shall be entered upon the journals, with the ayes and noes, and published once in each of four successive weeks in at least one newspaper of general circulation in each senatorial district wherein such a newspaper is published, within the two months' period immediately preceding the next general election.

At such general election the proposed amendments shall be submitted to the electorate for approval or rejection upon a separate ballot.

The conditions of and requirements for ratification of such proposed amendments shall be the same as provided in Section 2 of this article for ratification at a general election.

SECTION 4. No proposal for amendment of the constitution adopted in either manner provided by this article shall be subject to veto by the governor.

4. Article XVI of the Constitution of the State of Hawaii

SCHEDULE

Representative Districts

SECTION 1. As provided in Section 3 of Article III until the next reapportionment, the representative districts and the number of members to be elected from each shall be as follows:

First representative district: that portion of the island of Hawaii known as Puna, one representative;

Second representative district: that portion of the island of Hawaii known as South Hilo, four representatives;

Third representative district: that portion of the island of Hawaii known as North Hilo and Hamakua, one representative;

Fourth representative district: that portion of the island of Hawaii known as Kau and South Kona and that portion

of North Kona, for convenience herein referred to as Keauhou, more particularly described as follows: from a point at the seashore between the lands of Holualoa 1 and 2 and Puapuaa 2 running northeasterly along the boundary of Holualoa 1 and 2 to Puu Laalaau; (2) easterly in a straight line to a point called "Naohueelleua" being the common corner of the lands of Puuanahulu, Kaohe and Keauhou 2nd; (3) southeasterly along the common boundary between Hamakua and North Kona districts to the summit of Mauna Loa; (4) westerly along the common boundary between Kau and North Kona districts to the easterly boundary of South Kona district; (5) northerly and westerly along the boundary between North and South Kona districts to the seashore; and (6) northerly along the seashore to the point of beginning, one representative;

Fifth representative district: that portion of the island of Hawaii known as Kohala and that portion of North Kona not included in the fourth representative district, one representative;

Sixth representative district: the islands of Mologai and Lanai, one representative;

Seventh representative district: the islands of Maui and Kahoolawe, five representatives;

Eight representative district: that portion of the island of Oahu known as Koolaupoko and Koolauloa, two representatives;

Ninth representative district: that portion of the island of Oahu, for convenience herein referred to as Waialua and Wahiawa and a portion of Ewa known as Kunia and Waipio, more particularly described as follows: Beginning at the seashore on the boundary between the Ahupuaas of Waimea and Pupukea and following along the North boundary of the Ahupuaa of Waimea to Puu Kainapuaa on the Koolau Range at the junction of the Ahupuaas of Laie, Waimea and Kawailoa, thence southeasterly along the top of the Koolau Range, passing over Puu Pauao and Puu

Kaaumakua to the head of Kipapa Gulch, thence down along Kipapa Gulch in all its turnings and windings to Waiahole Ditch, thence southwesterly along Waiahole Ditch in all its turnings and windings to Reservoir No. 31 of the Oahu Sugar Company, thence following a direct line to Puu Palikea on the Waianae Mountain Range, thence northwesterly following along the top of Waianae Mountain Range, passing over Puu Kaua, Puu Kanehoa, Puu Hapapa, Puu Kumakalii, Puu Kalena, Puu Kaala to Puu Pueo, thence westerly along the boundary between the Ahupuaas of Kaena and Keawaula to the seashore at Kaena Point, thence easterly along the seashore to the point of beginning, two representatives;*

Tenth representative district: that portion of the island of Oahu, for convenience herein referred to as Ewa, (excluding Kunia and Waipio) and Waianae, more particularly described as follows: Beginning at the seashore at Kaena Point, on the boundary between the Ahupuaas of Kaena and Keawaula, and following along said boundary to Puu Pueo on the Waianae Mountain Range, thence southeasterly along the top of the Waianae Mountain Range, passing over Puu Kaala, Puu Kalena, Puu Kumakalii, Puu Hapapa, Puu Kanehoa, Puu Kaua to Puu Palikea, thence following a direct line to Reservoir No. 31 of the Oahu Sugar Company, thence northeasterly along Waiahole Ditch in all its turnings and windings to Kipapa Gulch, thence up along Kipapa Gulch in all its turnings and windings to the top of the Koolau Range, thence southeasterly along the top of the Koolau Range to the boundary between the Ahupuaas of Halawa and Moanalua, thence southwesterly along the boundary between the Ahupuaas of Halawa and Moanalua to the seashore, thence westerly along the seashore to the point of beginning, two representatives;*

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* The boundaries of the Ninth and Tenth representative districts were changed by amendments proposed by the Legislature and ratified by the electorate in 1962. The description of both districts are shown above in their amended form.

Eleventh representative district: that portion of the island of Oahu, for convenience herein referred to as Kalihi, more particularly described as follows: from the intersection of Kalihi and Auiki Streets running westerly along Auiki Street to Mokauea Street; (2) southwesterly along Mokauea Street Extension extended to a point on the outer edge of the reef; (3) westerly along the outer edge of the reef to a point on the Moanalua-Halawa boundary; (4) northerly and northeasterly along the Moanalua-Halawa boundary to the top of Koolau Range; (5) southeasterly along the top of Koolau Range to a place called "Puu Lanihuli"; (6) southwesterly along the top of the ridge between the lands of Kalihi, Kapalama and Nuuanu to Kalihi Street; and (7) southwesterly along Kalihi Street to the point of beginning, three representatives;

Twelfth representative district: that portion of the island of Oahu, for convenience herein referred to as upper Nuuanu, more particularly described as follows: from the intersection of King and Kalihi Streets running northeasterly along Kalihi Street to the ridge between the lands of Kalihi, Kapalama and Nuuanu; (2) northeasterly along the top of said ridge to a point on the Koolau Range called "Puu Lanihuli"; (3) easterly along the top of said Range to Pali Road at the Nuuanu Pali; (4) southwesterly along Pali Road to Nuuanu Avenue and southwesterly along Nuuanu Avenue to School Street; (5) northwesterly along School Street to thei center line of the Kapalama Drainage Canal (Waikiki Branch); (6) southwesterly along said Canal to the center line of the main Kapalama Drainage Canal; (7) southwesterly along said Canal to King Street; and (8) northwesterly along King Street to the point of beginning, three representatives;

Thirteenth representative district: that portion of the island of Oahu, for convenience herein referred to as Kapalama, more particularly described as follows: from the junction of the Honolulu Harbor Channel and the reef running westerly along the outer edge of the reef to

Mokauea Street Extension extended; (2) northeasterly along Mokauea Street Extension extended to Sand Island Road; (3) northeasterly along Mokauea Street Extension to Auiki Street; (4) easterly along Auiki Street to Kalihi Street; (5) northeasterly along Kalihi Street to King Street; (6) southeasterly along King Street to the center line of the main Kapalama Drainage Canal; (7) northerly along said Canal to the center line of the Kapalama Drainage Canal (Waikiki Branch); (8) northeasterly along said Canal to School Street; (9) southeasterly along School Street to Nuuanu Avenue; (10) southwesterly along Nuuanu Avenue to the sea, and (11) southwesterly along the middle of Honolulu Harbor and Honolulu Harbor Channel to the point of beginning, three representatives;

Fourteenth representative district: that portion of the island of Oahu, for convenience herein referred to as Pauoa, more particularly described as follows: from the junction of the Honolulu Harbor Channel and the outer edge of the reef running northeasterly along the middle of Honolulu Harbor Channel and Honolulu Harbor to the intersection of Queen Street and Nuuanu Avenue; (2) northeasterly along Nuuanu Avenue to Pali Road and northeasterly along Pali Road to the top of the Koolau Range at the Nuuanu Pali; (3) easterly and southerly along the top of the Koolau Range to a point called "Puu Konahuanui"; (4) southwesterly along the top of the ridge between the lands of Nuuanu, Pauoa and Manoa to a mountain peak called "Puu Ohia" or "Tantalus"; (5) southwesterly along the top of the ridge between the lands of Makiki and Kalawahine to the intersection of Nehoa Street and Lewalani Drive; (6) southerly along Lewalani Drive and Piikoi Street to Wilder Avenue; (7) easterly along Wilder Avenue to Punahou Street; (8) southerly along Punahou Street to King Street; (9) westerly along King Street to Kalakaua Avenue; (10) southerly along Kalakaua Avenue to the center line of the Ala Wai Canal; (11) westerly along said Canal and

along the line of said Canal extended to the outer edge of the reef; and (12) westerly along the outer edge of the reef to the point of beginning, five representatives;

Fifteenth representative district: that portion of the island of Oahu, for convenience herein referred to as Manoa and Waikiki, more particularly described as follows: from the intersection of Kalakaua Avenue and the center line of the Ala Wai Canal running northerly along Kalakaua Avenue to King Street; (2) easterly along King Street to Panahou Street; (3) northerly along Punahou Street to Wilder Avenue; (4) westerly along Wilder Avenue to Piikoi Street; (5) northerly along Piikoi Street to Lewalani Drive; (6) northerly along Lewalani Drive to Nehoa Street; (7) northeasterly along the top of the ridge between the lands of Makiki and Kalawahine to a mountain peak called "Puu Ohia" or "Tantalus"; (8) northeasterly along the top of the ridge between the lands of Pauoa, Manoa and Muuanu to a point on the Koolau Range called "Puu Konahuanui"; (9) southeasterly along the top of said Range to a place called "Mt. Olympus"; (10) southwesterly along the top of Waahila Ridge to the top edge of Palolo Valley; (11) southwesterly along the top edge of said Valley to the forest reserve boundary; (12) southwesterly along the southeasterly boundary of St. Louis Heights Tract, Series 2 (File Plan 464) to the southerly boundary of said Tract 100 feet southeasterly from Alencastre Street; (13) southwesterly parallel to and 100 feet from Alencastre Street and St. Louis Drive to Waialae Avenue; (14) westerly along Waialae Avenue to Kapahulu Avenue extended; (15) southerly across Waialae Avenue and along Kapahulu Avenue to Kalakaua Avenue; (16) westerly along Kapahulu Avenue extended to the outer edge of the reef; (7) northwesterly along the outer edge of the reef to a point on the line extended of the center line of the Ala Wai Canal; and (18) easterly along said line to the point of beginning, six representatives;

Sixteenth representative district: that portion of the island of Oahu, for convenience herein referred to as Kaimuki and Kapahulu, more particularly described as follows: from a point at the seacoast at a place called "Black Point" running westerly along the seacoast to Kapahula Avenue extended to the sea; (2) easterly across Kalakaua Avenue and easterly and northerly along Kapahula Avenue to Waialae Avenue; (3) easterly along Waialae Avenue to a point 100 feet easterly of St. Louis Drive; (4) northeasterly across Waialae Avenue then parallel to and 100 feet from St. Louis Drive and Alencastre Street to the southerly boundary of St. Louis Heights Tract, Series 2 (File Plan No. 464); (5) northeasterly along the southeasterly boundary of said Tract to the forest reserve boundary; (6) northeasterly along the top ridge of Palolo Valley to the top of Waahila Ridge; (7) northeasterly along the top of Waahila Ridge to a point on Koolau Range called "Mt. Olympus"; (8) easterly along the top of the Koolau Range to the top of the ridge between the lands of Waialae Nui and Palolo; (9) southwesterly along the top of said ridge to a place called "Kalepeamoa"; (10) southwesterly along Mauumae Ridge to Sierra Drive; (11) southwesterly along Sierra Drive to Waialae Avenue; (12) easterly along Waialae Avenue to 13th Avenue; (13) southwesterly along 13th Avenue and Ocean View Drive to Kilauea Avenue; (14) westerly along Kilauea Avenue to Makapuu Avenue; (15) southwesterly along Makapuu Avenue to Diamond Head Road; and (16) southeasterly along Diamond Head Road to the Military Road and along the Military Road extended to the point of beginning, four representatives;

Seventeenth representative district: that portion of the island of Oahu not included in any other representative district on the island of Oahu, together with all other islands not included in any other representative district, three representatives;

Eighteenth representative district: the islands of Kauai and Niihau, four representatives.

Wherever a roadway, or the intersection of one or more roadways, is designated as a boundary in any of the above descriptions, the center line of such roadway or intersection is intended as such boundary.

5. Act 334 of the Session Laws of Hawaii, Regular Session of 1949

Section 1. In order that Hawaii may be admitted in the Union on an equal footing with the original states, a convention for the purpose of forming a constitution and state government and otherwise preparing for such admission as a state shall be held, and the acts of said convention shall be submitted for ratification by the people, as provided in this Act.

For the purposes of this Act and the carrying out of its provisions:

(a) The limits of the proposed state shall be taken to be the area now constituting this Territory, as at present described.

(b) The laws of the proposed state at the time of its admission into the Union shall be deemed to comprise all laws then in force in the Territory of Hawaii, except as modified or changed by the constitution of the state or by ordinance of the constitutional convention duly ratified by the people, or by any Act of the Congress of the United States providing for the admission of said state.

Section 2. All citizens of the United States who have the qualifications for voters for representatives to the Territorial Legislature are hereby authorized to vote for and choose delegates to the convention. Such delegates shall possess the qualifications of such electors.

The convention shall consist of sixty-three delegates apportioned among the representative districts within the limits of the proposed state on the following basis:

First representative district, two delegates at large and in addition thereto one delegate each from precincts combined as follows: Precincts 1, 2, 3, 4, 5, 6, 7, and 36; precincts 8, 9, 10, 11, and 35; precincts 12, 13, 14, and 33; precincts 15, 16, 30, 17, and 34; precincts 18, 19, 20, 21, 31, and 22; precincts 23, 32, 24, 25, 26, 27, 28 and 29;

Second representative district, two delegates at large and in addition thereto one delegate each from precincts combined as follows: Precincts 1, 2, 3, 4, 5, 6, 7, 8, and 16; precincts 9, 10, 11, 12, 13, 14, and 15;

Third representative district, three delegates at large and in addition thereto one delegate each from precincts combined as follows: Precincts 1, 2, 3, 4, and 5; precincts 6, 7, 8, 10, and 11; precincts 9, 12, 13, and 28; precincts 14, 15, 16, and 17; precincts 18, 19, 20, 21, 22, 23, 24, 25, 26, and 27; precincts 29, 30, 31, 32, 33 and 34;

Fourth representative district, which for all purposes of this section shall exclude precincts 28 and 38 thereof, six delegates at large and in addition thereto two delegates each from precincts combined as follows: Precincts 25, 26, 27, 23, 22, 21, 20, and 19; precincts 24, 16, 15, 32, 17, 18, and 11; precincts 6, 36, 14, 13, 12, and 7; precincts 35, 5, 34, 31, and 8; precincts 4, 30, 33, 3, 9, and 10; precincts 1, 2, 29, and 37;

Fifth representative district, which for all purposes of this section shall include precincts 28 and 38 of the fourth district, six delegates at large and in addition thereto two delegates each from precincts combined as follows: Precincts 28 and 38, fourth district, and precincts 1, 2, 3, and 4, fifth district; precincts 5, 7, 30, and 31, fifth district; precincts 6, 29, 8, 9, 10, and 32, fifth district; precincts 11,

26, 14, 15, 16, 12, 13, and 33; precincts 18, 19, 20, 21, and 27, fifth district; precincts 17, 28, 22, 23, 24, and 25, fifth district;

Sixth representative district, two delegates at large and in addition thereto one delegate each from precincts combined as follows: Precincts 1, 2, 3, and 4; precincts 5 and 6; precincts 8, 9, 10, and 11; and one delegate from precinct 7.

The precincts herein mentioned are as they existed on November 2, 1948.

APPENDIX E

Memorandum to Judge Pence from Judge Beeks

MEMORANDUM

TO: Judge Pence DATE: March 31, 1965
FROM: Judge Beeks
SUBJECT: *Holt* v. *Richardson*

I discussed your proposed Decision and Order on Senate Reapportionment Plan of March 18, 1965, and your notes accompanying the same, in a telephone conference with Judge Jertberg on March 29th. Judge Jertberg, because of the fact that he was in Los Angeles without a secretary, asked me to convey to you our joint views, which are as follows:

1. Inasmuch as the Senate Reapportionment Plan of March 18, 1965, is not formally before us, we do not think that any decision and order should be filed because such decision and order would be purely advisory in nature.

2. We believe that the Senate should be redistricted into single senatorial districts, although we may approve two-member districts if any only if the legislature can affirmatively show substantial reasons therefor. There may very well be valid reasons for one or two 2-member districts in the neighboring islands but we perceive no justification whatsoever for other than single member districts on the Island of Oahu, particularly the heavily populated areas thereof.

We have no objection whatsoever to your making our views, as above expressed, informally known to all of the parties but we are opposed to the entry of a written decision and order.

I again discussed this matter with Judge Jertberg, who is now back in Fresno, this morning, read him this memorandum and he signified his approval and concurrence.

It is our suggestion that you discuss the subject matter of this memorandum with counsel for all parties immediately upon receipt of same (I hope you receive it tomorrow) and thereafter arrange a conference call with both of us (Judge Jertberg will be in Fresno) at noon your time on Friday.

cc: Judge Jertberg
Fresno, Calif.

COPY

FILED
JUL 6 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 323

ELMER F. CRAVALHO, et al., *Appellants*,

v.

WILLIAM S. RICHARDSON, et al., *Appellees*.

Upon Appeal from the United States District Court for the District of Hawaii

JURISDICTIONAL STATEMENT

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IN THE

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ELMER F. CRAVALHO, et al., *Appellants,*

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WILLIAM S. RICHARDSON, et al., *Appellees.*

Upon Appeal from the United States District Court for the District of Hawaii

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the United States District Court for the District of Hawaii (R. 582),[1] holding invalid, under the Equal Protection Clause of the Federal Constitution, the legislatively proposed provisional plan for the apportionment of seats in the Senate of the Hawaii Legislature, which is not yet reported, is set forth in Appendix A. (A. 1a) A prior opinion of the district court (R. 370), enjoining the parties including appellants Elmer F. Cravalho, et al., from enacting any

[1] Citations to the unprinted Record are hereafter: "R. "; to the printed Appendix: "A. "; to the unprinted Transcript of Proceedings: "TR. ".

legislation until reapportionment legislation satisfactory to the district court has been enacted, also unreported, is set forth in Appendix A. (A. 17a)

JURISDICTION

This action was instituted by the original plaintiffs Henrietta Davidson Holt, et al., citizens, taxpayers and electors of the United States and of the State of Hawaii, in the District Court for the District of Hawaii, under 42 U.S.Code §§ 1983, 1988, 28 U.S.Code § 1343 and 28 U.S.Code §§ 2201, 2202, to enjoin appellee William S. Richardson, Lieutenant Governor of Hawaii, from conducting the 1964 election for State legislative offices and to declare unconstitutional and unenforceable those portions of the Constitution of the State of Hawaii (Sections 2, 3 and 4 of Article III, Section 1 of Article XVI, and the proviso at the end of the sixth paragraph in Section 2 of Article XV) relating to the apportionment of the Senate and the House of Representatives of the State Legislature.

On August 24, 1964 John A. Burns, Governor of Hawaii, intervened as intervenor-plaintiff, and Nelson K. Doi, et al., (certain State senators) and appellants Elmer F. Cravalho, et al., (certain State representatives) intervened as intervenors-defendants.

On August 26, 1964, a three-judge court, convened pursuant to 28 U.S.Code § 2281 et seq., denied the prayer of the plaintiffs Henrietta Davidson Holt, et al., to enjoin the conduct of the 1964 election for State legislative offices. On February 17, 1965, the district court filed its Order, entered April 9, 1965, adjudging that certain provision of Article III, Section 2 covering the apportionment of the Senate and the said proviso of Article XV, Section 2 relating to the amend-

ments affecting representation in the Senate were unconstitutional and invalid and also holding that any change in the representation from any Hawaii senatorial district must be by constitutional amendment and not by statute. The Order also denied the prayer of John A. Burns to enjoin the 1966 election but provided, in lieu thereof, relief prompting reapportionment by enjoining the legislators from enacting any legislation until legislation pursuant to the provisions of Article XV of the Hawaii Constitution providing for the submission to the people of Hawaii by special election to be held not later than August 1, 1965, the question: "Shall there be a convention to propose a revision of or amendments to the constitution?", and for any and all acts required by law to implement such legislation, has been enacted into law.

Pursuant to motion of Nelson K. Doi, et al., and appellants Elmer F. Cravalho, et al., the district court, by Order of March 9, 1965, entered March 19, 1965, provisionally amended paragraph 4 of its Order of February 17, 1965, to allow the legislature to propose and submit to the district court for its approval a reapportionment plan of the Hawaii Senate providing thereby an opportunity to avoid the costly and circuitous route of accomplishing reapportionment at a constitutional convention. On April 14, 1965 a reapportionment plan of the Hawaii Senate was duly submitted to the district court by the Third Legislature. On April 28, 1965, the district court filed and entered its Order on the reapportionment plan of April 14, 1965 rejecting as unconstitutional the said reapportionment plan and thereby reinstating the Order of the district court of February 17, 1965, which enjoined the legislators from enacting any legislation until legis-

lation for the calling of a constitutional convention shall have been enacted.

A notice of appeal to this Court was filed on May 3, 1965 by John A. Burns, Governor of Hawaii. Separate notices of appeal to this Court were filed on May 7, 1965 by Nelson K. Doi, et al., and the appellants Elmer F. Cravalho, et al., respectively. On application of May 13, 1965 by the said John A. Burns, Justice Douglas of this Court, on May 21, 1965, granted a stay of the district court's injunction pending the timely docketing of an appeal to this Court for its consideration of the jurisdictional aspect of the case, the stay being further conditioned upon immediate expiration should this Court summarily dismiss the appeal or reverse or affirm the judgment below. The expiration of the stay in effect would reinstate the injunction enjoining the parties including appellants Elmer F. Cravalho, et al., from enacting any legislation until legislation for the calling of a constitutional convention shall have been enacted. The jurisdiction of this Court to review the decision of the district court on direct appeal is conferred by 28 U.S.Code § 1253; and such jurisdiction is customarily exercised. E.g. *Reynolds* v. *Sims*, 377 U.S. 533 (1964); *WMCA* v. *Lomenzo*, 377 U.S. 633 (1964); *Davis* v. *Mann*, 377 U.S. 678 (1964); *Roman* v. *Sincock*, 377 U.S. 695 (1964); *Lucas* v. *Colorado General Assembly*, 377 U.S. 713 (1964).

FEDERAL AND STATE CONSTITUTIONAL PROVISIONS INVOLVED

1. The Fourteenth Amendment to the Constitution of the United States.

2. Article III, Sections 1, 2, 3, 4 and 5, of the Constitution of the State of Hawaii, Revised Laws of

Hawaii 1955 (1963 Supp.), p. 10 et seq., relating to the apportionment of the Hawaii Senate and House of Representatives.

3. Article XVI, Section 1, of the Constitution of the State of Hawaii, Revised Laws of Hawaii 1955 (1963 Supp.), p. 22 et seq., which sets forth a schedule of the representative districts and the number of representatives to be elected from each district.

4. Article XV of the Constitution of the State of Hawaii, Revised Laws of Hawaii 1955 (1963 Supp.), p. 21 et seq., relating to the methods of revision and amendment of the Hawaii Constitution.

The above are set forth in Appendix B. (A. 1b et seq.)

QUESTIONS PRESENTED

1. Does the fact that the geographical boundaries of certain districts of one house of a bicameral legislature of the State of Hawaii are identical to, or coincide to a great degree with, the geographical boundaries of certain districts of the other house violate the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States?

2. Does the weight of the votes of the citizens in districts where the geographical boundaries for both senatorial and representative districts are identical or coincide to a great degree far exceed the weight of votes of citizens in districts where the geographical boundaries for senatorial and representative districts do not coincide, so that there is a violation of the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States?

3. Does the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States necessarily require that the Hawaii Senate be apportioned in accordance with a rule of single-member districts where the House of Representatives, with single-member and multi-member districts, has been found to be constitutionally apportioned?

4. Does the reapportionment plan for the Hawaii Senate which the legislature of the State of Hawaii submitted to the district court on April 14, 1965, pursuant to the order of the district court, violate the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States?

5. Where the legislature of the State of Hawaii has constructed senatorial districts with substantial equality of population for each district in accord with the number of senators to be elected from the respective senatorial districts, does the legislature have the burden of justifying that such reapportionment plan does not operate to minimize or cancel out the voting strength of political, social, economic, or racial elements of the voting population, or do the opponents of such plan have the burden of demonstrating such invidious results?

6. Where the legislature of the State of Hawaii has constructed senatorial districts with substantial equality of population for each district in accord with the number of senators to be elected from the respective senatorial districts, and where the House of Representatives, with single-member and multi-member districts, has been found to be constitutionally apportioned, does the legislature of the State of Hawaii have the burden of justifying that the two houses comple-

ment each other so that there is no violation of the United States Constitution, or do the opponents of such reapportionment plan have the burden of demonstrating that the two houses fail to complement each other to such an extent that there is a violation of the United States Constitution?

7. Did the district court, in seeking to compel the legislature of the State of Hawaii to enact reapportionment legislation in compliance with the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States, abuse its discretion through the employment of excessive and drastic measures, to wit: the prohibition of enactment by the legislature of legislation essential for the operation of State and county governments in Hawaii and essential for the continuation of programs necessary for the health and welfare of the people of Hawaii until such time as reapportionment legislation has been passed to the satisfaction of the district court?

8. Where certain provisions of the Hawaii Constitution relating to the apportionment of the Hawaii Senate are invalid, does the legislature of the State of Hawaii have the authority to enact at least provisional reapportionment legislation relating to the Hawaii Senate, pending the adoption of valid amendments to the Hawaii Constitution providing for the reapportionment of the Hawaii Senate in accord with the United States Constitution?

STATEMENT OF THE CASE

In brief, this appeal challenges the decision of the United States District Court for the District of Hawaii (1) holding invalid, under the Equal Protection Clause

of the Federal Constitution, the legislatively proposed provisional plan for the apportionment of seats in the Senate of the Hawaii Legislature, (2) holding that any change in the representation from any Hawaii senatorial district must be by constitutional amendment thereby foreclosing provisional reapportionment by statute, and (3) enjoining the enactment by the legislators of any legislation until such time as reapportionment legislation has been passed to the satisfaction of the district court.

1. In Limine

The case was instituted in the United States District Court for the District of Hawaii by Complaint filed on August 13, 1964, by the original plaintiffs Henrietta Davidson Holt, et al., as citizens, taxpayers and electors of the State of Hawaii, on their behalf and on behalf of others, seeking a declaratory order that those sections of the Hawaii Constitution which dealt with the apportionment of the Hawaii Legislature had deprived and continued to deprive the complaining citizens of liberty and property without due process of law and of the equal protection of the laws, all in violation of the Fourteenth Amendment of the United States Constitution. (R. 2)

The Complaint also sought an injunction against the Lieutenant Governor of the State of Hawaii, the officer charged with the responsibility for supervision of State elections, prohibiting him from proceeding with the 1964 general election until such time as the Hawaii Legislature had been reapportioned to the satisfaction of the district court. Failing satisfactory reapportionment through the efforts of the legislature itself, the Complaint requested that the district court undertake to reapportion the legislature.

On August 24, 1964 appellants Elmer F. Cravalho, et al., being certain members of the Hawaii House of Representatives, intervened in the case below as party defendants, with a view to making the position of the House known to the district court and facilitating the reapportionment. (R. 87)

After denying a preliminary injunction against the holding of the 1964 general election, (TR. 156 August 26, 1964) the district court held a full hearing on the Complaint in January, 1965. After that hearing, the district court, by Order dated February 17, 1965, and entered on April 9, 1965, held that the provisions of the Hawaii Constitution relating to apportionment of the State Senate are contrary to the Equal Protection Clause of the Fourteenth Amendment. (A. 37a) The district court declared that the Hawaii Legislature could not, by statute, effect reapportonment (A. 35a) and directed that the legislators provide for a 1965 special election looking toward the convening of a constitutional convention to propose an amendment to the Hawaii Constitution (to be then submitted to the electorate) effecting at least the reapportionment of the Senate and enjoined the legislators from enacting any legislation until legislation for the calling of a constitutional convention shall have been enacted. (A. 37a)

By Order of March 9, 1965, entered March 19, 1965, the lower court provisionally amended Paragraph 4 of its Order of February 17, 1965 (which had not at that time been entered) to permit the legislature (a) to enact a provisional reapportionment and redistricting plan for the Senate; (b) to adopt a proposed constitutional amendment embodying pertinent provisions of the foregoing reapportionment and redistricting

plan for submission to the electorate at the 1966 general election; and (c) to enact legislation to submit to the electorate the question: Shall there be a convention to propose a revision of or amendments to the constitution? This Order, like the one of February 17th, demanded that the plan be approved by the district court; failing approval, the Order of February 17th demanding legislation for implementing a constitutional convention would again become effective. (R. 448, R. 454)

On March 18, 1965, the legislature advised the district court that a provisional plan, in substance approved by both Houses, was then in conference committee and about ready to be presented to the district court, whereby the Senate was reapportioned by dividing the State into the same original and existing six senatorial districts, changing only the number of senators allocated to each district, based upon the use of the method of equal proportions. (A. 3a) By that March 18th plan, the senators were apportioned as follows:

County	Senatorial District	No. of Senators
Hawaii	First	2
"	Second	1
Maui	Third	2
Honolulu	Fourth	9
"	Fifth	10
Kauai	Sixth	1

The legislature quickly thereafter was informally made to understand by the district court that such a grossly lumpy apportionment of senators, whereby forty per cent of the entire Senate would come from one senatorial district and thirty-six per cent from

another alongside, could never be approved, and the plan was forthwith withdrawn from conference committee for reconsideration by the House. Shortly thereafter, the district court informally indicated that because Hawaii had a multi-member district House, the district court would require a rule of single-member districts for the Senate so that any other than single-member senatorial districting would have to be justified to the district court. (A. 4a)

2. The Proposed Provisional Plan

Pursuant to the Order of March 9, 1965, entered March 19, 1965, and after the informal advice of the district court with respect to the March 18th plan and the rule of single-member districts for the Senate which appellants Elmer F. Cravalho, et al., challenge herein, the legislature, on April 14, 1965, passed and sent to the district court the following bills: (a) H. B. 987, the proposed provisional senatorial reapportionment plan; (b) H. B. 773, the proposed constitutional amendment embodying that same plan; and (c) H. B. 986, submitting to the electorate in the 1966 general election the question of the calling of a constitutional convention. (R. 536) By H. B. 987, the State was divided into eight senatorial districts, viz.:

County	Senatorial District	No. of Senators	1964 Registered Voters per District
Hawaii	First	3	28,130
Maui	Second	2	18,786
Honolulu	Third	3	27,073
"	Fourth	4	35,780
"	Fifth	4	39,361
"	Sixth	4	40,629
"	Seventh	4	37,336
Kauai	Eighth	1	12,266

The reports of the conference committee on the proposed provisional plan (H. B. 987), as well as the proposed plan for the constitutional amendment (H. B. 773) embodying the same, setting forth the conference committee's reasons for redistricting the Senate on a multi-member district basis were also presented. (R. 536-579)

The legislature had apportioned, as nearly as it believed was practicable, one senator to every 9,500 registered voters, and had relied heavily on the standards of compactness and contiguity in drawing the district lines. (R. 558) It had also given recognition to the political subdivisions determined by the insular exigencies of Hawaii with its many islands as well as to the natural and historical boundary lines. (R. 558)

3. The Hearing And Decision

At the hearing on April 15, 1965 for the presentation of the proposed provisional senatorial reapportionment plan, Robert Schmitt, a statistician, testified that the several district lines followed excellent statistical or historical boundaries and resulted in logical lines of division. (TR. 221-227 April 15, 1965) The district court, however, held, in its Order of April 28, 1965, that the Senate plan failed to sufficiently complement the House apportionment in that the legislature in setting up the senatorial districts ignored such factors as community of interests, community of problems, socio-economic status, political and racial factors and created geographical boundaries of some senatorial districts so that they were identical to or coincided to a great degree with the geographical boundaries of some representative districts of the House resulting in a disproportional monolithic command for the

majorities within such monolithic political units to the prejudice and dilution of the weight of the votes of the minorities therein as well as of all other electors of the State without. (A. 11a) The district court emphasized by stating:

"While it is a fundamental factor under the decisions of The Court, population is not the sole definitive measure for setting up either representative or senatorial districts. Compactness and contiguity of the territory are admittedly also factors, but community of interests, community of problems, socio-economic status, political and racial factors—each and all must be considered, and not only must the electoral districts be laid out with the totality of those factors having been taken into consideration, but even more, the sum total of all of the districting must result in substantial equality of meaningful representation to each and all of the voters of the State. 'All who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income and wherever their home may be in that geographical unit. *Gray* v. *Sanders,* 372 U.S. 368, 379.' " (A. 12a)

"Apparently, ethnic, political, industrial, economic, social, occupational factors, and community of interests and problems were given little if any consideration by the Legislature." (A. 6a)

It was never contended that there was not "substantial equality of population" among the eight senatorial districts under the proposed provisional senatorial plan, and the district court agreed that the number of registered voters per senatorial district conformed to the standards required under the method of

equal proportions prescribed by the Constitution of the State of Hawaii.[2] (A. 5a)

The district court nevertheless found the proposed provisional Senate plan, having failed to meet the test of equality of representation set down by this Court, to be invalid and disapproved the plan. (A. 15a)

Following the district court's ruling of April 28, 1965, John A. Burns, Governor of Hawaii, filed his timely notice of appeal to this Court (R. 612), and Nelson K. Doi, et al. and appellants Elmer F. Cravalho, et al., being desirous of bringing up for review other portions of the orders appealed from, filed their timely notices of appeal separately to this Court. (R. 641, R. 651)

THE QUESTIONS ARE SUBSTANTIAL

The Hawaii Legislature in good faith constructed State senatorial districts out of its geography of islands, which meet the equal-population standard of *Reynolds* v. *Sims,* 377 U.S. 533. It was not contended that the legislature failed to divest the less populated areas of their over-representation. The district court agreed that there was substantial equality of population among the proposed senatorial districts. However, the district court held the senatorial reapportionment plan unconstitutional. The court below laid down certain constitutional tests, which appellants herein believe unwarranted and unnecessary to achieve substantial equality of the weight of votes.

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[2] The district court had earlier held, by its Order of February 17, 1965, that the registered voter basis was a constitutionally valid "population" basis and that the House was validly apportioned under the method of equal proportions. (A. 31a)

This appeal presents novel and substantial questions with respect to these constitutional tests, purportedly based on the equal-population principle of *Reynolds* v. *Sims, supra,* by which the district court rejected as unconstitutional the reapportionment plan of the Hawaii Legislature and reinstated its permanent injunction against the parties in this case, including appellants Elmer F. Cravalho, et al., from enacting any legislation until certain reapportionment legislation satisfactory to the district court has been passed.

A. The Fact That the Geographical Boundaries of Certain Districts of One House of a Bicameral Legislature Are Identical To, Or Coincide To a Great Degree With, the Geographical Boundaries of Certain Districts of the Other House Does Not Violate the Equal Protection Clause.

According to the district court, "monolithic" political units violate the Equal Protection Clause of the Fourteenth Amendment. Where the geographical boundaries of certain districts of one house are identical to, or coincide to a great degree with, the geographical boundaries of certain districts of the other house, this situation results in the so-called "monolithic" political units.

The district court stated that the majorities in such "monolithic" districts are given a disproportional monolithic command, not only within the district, but also as compared to voters in non-"monolithic" districts.

Appellants herein believe that the so-called "monolithic" districts are not per se unconstitutional. Where all of the senatorial and representative districts have substantial equality of population in accord with the number of legislators to be elected from the respective

districts, the voters in the "monolithic" districts and the voters in the non-"monolithic" districts have votes of substantially equal weight.

The question of "monoliths" is substantial, because the district court held that in order to achieve equality of voting power there should not be any such "monoliths" in the reapportionment plan. This question is new and has far-reaching effect and importance to reapportionment plans throughout the nation.

B. The Equal Protection Clause Does Not Necessarily Require That One House of a Bicameral Legislature Be Apportioned In Conformity With a Rule of Single-Member Districts.

The district court found the apportionment of the Hawaii House of Representatives, with single-member and multi-member districts, to be constitutionally valid. The court below also stated that because Hawaii had a multi-member district house, any other than single-member senatorial districting would have to be justified to the district court.

The Court has stated that single-member districts may be the rule in one State, while another State might desire multi-member districts. *Reynolds* v. *Sims*, 377 U.S. 533, at p. 579.

The Hawaii Legislature chose to construct multi-member senatorial districts (except for one single-member district on the island of Kauai). All the senatorial districts had substantial equality of population in accord with the number of senators to be elected from the respective districts. Yet the district court demanded that the Hawaii Legislature construct senatorial districts in conformity with a rule of single-member districts.

Appellants herein believe that a State may choose multi-member districts as the rule in both houses of its legislature. Again, this question is substantial and important to the accomplishment of valid reapportionment.

C. Where the Hawaii Legislature Has Constructed Districts With Substantial Equality of Population, the Opponents of Such Reapportionment Plan Have the Burden of Demonstrating That the Plan Operates To Minimize Or Cancel Out the Voting Strength of Political, Social, Economic, Or Racial Elements of The Voting Population.

The Hawaii Legislature constructed districts with substantial equality of population without regard to race, sex and socio-economic factors. The court below demanded that the legislature consider these factors and justify the districting plan with such factors.

Appellants herein contend that (1) where the districts have substantial equality of population and (2) where the legislature has constructed the districts without attempting to dilute the voting strength of any political, social, economic or racial element, then the opponents of such reapportionment plan have the burden of demonstrating invidious results, if any. *Fortson* v. *Dorsey*, 379 U.S. 433.

This question is one of grave import, because it concerns the proper judicial scrutiny of State legislative apportionment plans.

D. The District Court, In Enjoining Appellants From Enacting Any Legislation Until Certain Reapportionment Legislation Satisfactory To The District Court Has Been Passed, Abused Its Discretion.

The district court rejected the senatorial reapportionment plan submitted by the Hawaii Legislature and thereby reinstated its injunction against the par-

ties, including appellants Elmer F. Cravalho, et al., from taking final action upon any legislation until legislation looking toward the convening of a constitutional convention to propose amendments to the Hawaii Constitution (to be then submitted to the electorate) effecting reapportionment of the Senate, has been passed.

This permanent injunction against the legislators from the performance of their legislative duty was a serious abuse of discretion. The injunction prohibits the legislators from providing essential legislation for the health and welfare of the people and the orderly functioning of State and county governments.

There is no justification for punishing the people of an entire State by the imposition of a procedural device to effect the compliance of certain parties with the orders of the lower court. This question is substantial and of vital import with respect to judicial relief.

E. The Hawaii Legislature Has Authority To Enact At Least Provisional Reapportionment Legislation, Pending the Adoption of Valid Amendments To the Hawaii Constitution Providing For the Reapportionment of the Hawaii Senate In Accord With the United States Constitution.

The district court declared that certain provisions of the Hawaii Constitution violated the Equal Protection Clause and are invalid. All parties to this case agree that the Hawaii Senate is malapportioned and that such provisions are invalid.

Appellants herein contend that the legislature has the authority to enact at least provisional senatorial reapportionment legislation, absent valid provisions of the Hawaii Constitution prescribing senatorial apportionment.

Further, appellants contend that the State may have a reasonable time to adopt amendments to the State constitution, i.e., at the 1966 election the legislature shall submit to the electorate for ratification amendments to the Hawaii Constitution providing for a permanent reapportionment plan, so long as the 1966 elections for State legislative offices are held according to a statutory apportionment plan which comports with the Equal Protection Clause.

This question is substantial and important, involving State legislative power to provide reapportionment legislation for an area covered by State constitutional provisions which are invalid and violative of the United States Constitution.

CONCLUSION

For the reasons stated, appellants respectfully submit that the questions presented are so substantial as to require plenary consideration.

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APPENDIX A

[R. 582]

DECISION AND ORDER ON HAWAII'S SENATE REAPPORTIONMENT PLAN OF APRIL 14, 1965

This court has now before it the Hawaii State Legislature's H.B. No. 987, S.D.1, C.D.1; H.B. No. 773, S.D.1, C.D.1; and H.B. No. 986, setting forth that body's response to this court's order of March 9, 1965, viz., presenting (a) a plan for the provisional reapportionment of the Senate on the basis of the voters registered for the 1964 general election; (b) a proposed constitutional amendment encompassing the same plan; and (c) a submission to the electorate in 1966 of the question of calling a constitutional convention.

The road by which the above bills reached this court is tortuous. In August of 1964, when this court first heard this case, the Legislature of Hawaii was then sitting in special session called by the Governor of Hawaii for the specific purpose of attempting to devise a scheme of legislative reapportionment which would be constitutionally valid. The legislature at that session failed to agree on any reapportionment plan. After a hearing in January 1965, this court, on February 17, 1965, found that Article III, Section 2, of the Hawaii State Constitution fixing the number of senators per senatorial district, as well as the proviso at the end of the sixth paragraph in Section 2 of Article XV of the constitution, were invalid, "determined that the Senate *at least* must be reapportioned before the 1966 general election," and enjoined the Third State Legislature in its regular 1965 session from passing any but preliminary "housekeeping" acts until it had set up the machinery for the convening of a constitu-

tional convention to amend the State's legislative scheme of apportionment before the 1966 election. (Emphasis added.)

On March 1st, 1965, the legislature, then convened in regular session, requested this court to alter its order of February 17th so as to permit the legislature itself during that session to pass legislation:

(a) enacting a provisional plan for reapportioning the senate on the basis of the 1964 registered voters, to be effective for the 1966 election and until a constitutional amendment on reapportionment had been adopted by the people of Hawaii as provided in the constitution;

(b) adopting a proposed constitutional amendment embodying pertinent provisions of the foregoing reapportionment plan to be presented to the electorate for ratification at the 1966 general election; and

(c) submitting to the electorate at that 1966 election the question, under Article XV of the State constitution: Shall there be a convention to propose a revision of or amendments to the constitution?

Counsel for all parties to the suit were in accord with the objectives outlined in the motion, and this court was satisfied from the representations made that the constitutional convention route prescribed by its February 17th order would be very expensive and perforce would demand the devotion of great time and effort from the people of Hawaii. The court, then, also believed that the legislators, each and all, would recognize their obligations to the entire electorate of Hawaii, would rise above any possible self-interest, would heed the admonitions of the Attorney General,

and would certainly note the flashing red lights of the caveats set out in this court's order of February 17th, viz., that a constitutional convention *in addition* to providing for reapportionment of the senate might also consider (1) whether the registered voter population should continue to be used as the basis for apportionment, or some other type of population basis should be adopted; (2) "whether it is better to have one or both houses of the legislature composed of single member representative districts, or to have and *justify*[9] one or both houses composed in whole or in part, of multi-member or floterial districts. (Note)[9] *Butcher* v. *Bloom*, 203 A.2d 556, 572-73" (emphasis added); (3) whether there should be a change in the date of decennial reapportionment; and (4) whether there should be redistricting of the representative districts.

This court therefore, by order of March 9, 1965, altered its February 17th order to permit the legislature (a) to enact a provisional reapportionment and redistricting plan for the senate; (b) to adopt "a proposed constitutional amendment embodying *pertinent* provisions of the foregoing reapportionment and redistricting plan" for submission to the electorate at the 1966 general election (emphasis added); (c) to enact legislation to submit to the electorate the question: Shall there be a convention to propose a revision of or amendments to the constitution? This order, like the one of February 17th, demanded that the plan be approved by this court; failing approval, the order of February 17th demanding legislation for implementing a constitutional convention would again become effective.

On March 18th this court was advised that a provisional plan, in substance approved by both houses,

was then in conference committee and about ready to be presented to this court, whereby the senate was reapportioned by dividing the State into the same original six senatorial districts, changing only the number of senators allocated to each district, based upon the use of the method of equal proportion. By that March 18th plan, two senators were apportioned to the first senatorial district—East Hawaii; one to the second—West Hawaii; two to the third—Maui; nine to the fourth—Southern Oahu; ten to the fifth—the remainder of Oahu; and one to the sixth—Kauai.

The legislature quickly thereafter was informally made to understand that such a grossly lumpy apportionment of senators, whereby forty per cent of the entire senate would come from one senatorial district and thirty-six per cent from another alongside, could never be approved, and the plan was forthwith withdrawn from conference committee for reconsideration by the house of representatives. Shortly thereafter, this court flashed an even brighter red light on its caveat number (2) above by informally indicating that because Hawaii had a multi-member district house, any other than single member senatorial districting would have to be justified to this court.

On April 14th, 1965, the legislature passed and sent to this court the numbered bills identified *supra:*

A. H.B. 987, its proposed provisional senatorial reapportionment plan; H.B. 773, its proposed constitutional amendment embodying that same plan; and H.B. 986, submitting to the electorate in the 1966 general election the question of the calling of a constitutional convention. By H.B. 987, the State was divided into eight senatorial districts, viz.:

County	Senatorial District	No. of Senators	1964 Registered Voters per District
Hawaii	First	3	28,130
Maui	Second	2	18,786
Honolulu	Third	3	27,073
"	Fourth	4	35,780
"	Fifth	4	39,361
"	Sixth	4	40,629
"	Seventh	4	37,336
Kauai	Eighth	1	12,266

B. Exhibits A and B, attached to the plan, the same being the reports of the conference committee on the proposed provisional plan (H.B. 987), as well as the proposed plan for the constitutional amendment (H.B. 773) embodying the same, setting forth the conference committee's "justification" for wholly abandoning any attempt to redistrict the senate on a single member district basis.

Senate exhibits Nos. 5 and 6 (maps also filed), outlined the geographical boundaries of the respective senatorial districts of Honolulu.

The court would agree that the number of registered voters per senatorial district and apportioned to the four basic areas, viz., three to the County of Hawaii, two to the County of Maui, nineteen to the City and County of Honolulu, and one to the County of Kauai, conforms to the standards required under the method of equal proportions prescribed by the Constitution of the State of Hawaii and thus meets that one test of constitutionality. *Roman* v. *Sincock,* 377 U.S. 695 (1964); *Reynolds* v. *Sims,* 377 U.S. 533 (1964).

In the attached committee reports, the reasons given, i.e., "justification," for choosing multi-member districts

of three and four senators per district were substantially: (1) single-member districts would tend to cause the senators therefrom to be concerned with localized issues and ignore the broader issues facing the State, and therefore it might fragment the approach to state-wide problems and programs to the detriment of the State; (2) historically the members of the house had represented smaller constituencies than members of the senate, and tradition and experience had proved that balance desirable; (3) multi-member districts would increase the significance of an individual's vote by focusing his attention on the broad spectrum of major community problems as opposed to those of more limited and local concern; (4) to set up single-member districts would compound the more technical and more intricate problem of drawing the boundaries; (5) population shifts would more drastically affect the boundaries of many smaller single-member districts—to a greater degree than would be found in larger multi-member districts, citing Oahu's population boom and subdivision development.

In drawing the district lines the legislature reported that it "relied very heavily" on the standards of compactness and contiguity—"geographical separation and long-established representative precinct lines."

Except for the slightly misleading conclusion that the third senatorial district was *primarily* a suburban area, and that the fourth senatorial district was composed of substantially plantation and suburban communities, from the report it appears that no other criteria, save number of registered voters, geographical boundaries and historical representative district lines were considered or used in forming the plan. Apparently, ethnic, political, industrial, economic, social,

occupational factors, and community of interests and problems were given little if any consideration by the legislature.

The testimony of Senator Sakai Takahashi, chairman of the conference committee, at the April 15, 1965 hearing on the plan, summed up the legislature's underlying raison d'etre with his statement: "We thought it fair."

Mr. Robert Schmitt, statistician, who had testified at length in the hearing of August 1964, again a witness, testified in favor of applying the law of large numbers, viz., that smaller areas with small numbers fluctuate in much greater proportion than do larger areas with larger numbers, to senatorial districts. He, however, had *not been consulted* on the problem of the multi-member districts vs. single-member, or the problem of district lines.[1]

In analyzing the plan, all Mr. Schmitt could say for the third senatorial district was that it had excellent statistical boundaries.[2] It was logical to deduce from his testimony that the boundary between the fourth and fifth senatorial districts had accidentally resulted in an excellent *line of division,* in that it separated the

[1] In its (unsubmitted) plan of March 18th, *supra*, p. 4, two senators were to be elected from East Hawaii, and one senator from West Hawaii. The total registered voters in 1964 in East Hawaii was 20,770, and in West Hawaii was 7,360. In the present provisional plan, this division of the Island of Hawaii was dropped and three senators were to be elected from the first senatorial district, which would now include the entire island. Of the seven senators presently elected from districts one and two, five live within a short distance of each other in Hilo, in East Hawaii.

[2] The location of the residences of two of Honolulu's present total of ten senators is in this district.

military area, i.e., military housing, etc., from the city proper. The best that he could say, however, for the line between the fifth and sixth senatorial districts was that it neatly separated the central business district from residential areas alongside. The line between the sixth and seventh senatorial districts was historical.

Mr. Schmitt, in contradistinction to the conference committee, found it necessary to analyze the representative districts and criticized many of them as being far too small, e.g., the first—on Hawaii, the thirteenth—Kalihi, on Oahu; or much too large, e.g., the fifteenth—with its six representatives. Schmitt pointed out that within the fifteenth district, in the Moiliili area, there was a higher proportion of persons of Japanese ancestry than in any census tract of the island, yet Waikiki, primarily concerned with tourist service, was the second highest among census tracts in percentage of Caucasian residents. Also, high-level professional, technical and managerial people tended to live in Waikiki or upper Manoa,[3] whereas operatives, laborers, clerical workers, middle and lower-middle income people lived in the central (Moiliili, etc.) area.

Mr. Schmitt stated that the fifth senatorial district likewise encompassed a highly heterogeneous area containing a multitude of Caucasian widows in the uplands area, and an overabundance of Filipino males in the seaward portion of the district. The twelfth representative district, therein, had a very high proportion of persons of foreign birth or Asiatic ancestry,

[3] The residences of the three senators from the present fourth senatorial district showed that all lived only a very short distance apart in the upper Manoa area of the fifteenth representative district.

of the lower-middle socio-economic group.[4] Schmitt's only other comment regarding the fifth senatorial district was that the boundary between the twelfth and thirteenth representative districts, i.e., within the proposed fifth senatorial district, had a very unfortunate location.

Schmitt also pointed out that within the seventh senatorial district were two clearly defined and geographically, economically and socially divided groups. In Palolo in the sixteenth representative district area were found the lower socio-economic laborers, operatives, and clerical workers, and in the Waialae-Kahala and Aina Haina areas were the highly professional and managerial class. In the latter area the median annual family income in 1959 was almost $16,000, whereas in Palolo it was $3,000.

From the committee reports and the testimony of Senator Takahashi, it is obvious that the legislature gave sparse, if any, consideration of any of the facts or factors pointed out by Mr. Schmitt, in devising its scheme of multi-member senatorial districts for Oahu.

Although we initially determined that the house of representatives was not unconstitutionally apportioned, by that decision we did not say that those representative districts had been perfectly laid out. We agree with Mr. Schmitt that, compared to the make-up of all other representative districts in the State, the fifteenth is too large.

There can be no truly representative government without a system of apportionment which provides

[4] Similarly, three senators from the fifth district likewise lived a short distance from each other in the twelfth representative district.

potentially equal representation to the divergent factors incorporated within the body politic. Our own representative form of government demands checks and balances, devices and procedures to channel the many and diverse interests of the people into the making of a stream of legislation that produces for each person in that state the maximum beneficence possible. Methods of securing this desired objective were pointed out in *Reynolds* v. *Sims, supra,* at 576-77:

> "Different constituencies can be represented in the two houses. One body could be composed of single-member districts while the other could have at least some multimember districts. The length of terms of the legislators in the separate bodies could differ. The numerical size of the two bodies could be made to differ, even significantly, and the geographical size of districts from which legislators are elected could also be made to differ. And apportionment in one house could be arranged so as to balance off minor inequities in the representation of certain areas in the other house. In summary, these and other factors could be, and are presently in many States, utilized to engender differing complexions and collective attitudes in the two bodies of a state legislature, although both are apportioned substantially on a population basis."

In reapportioning and redistricting the senate, both houses overlooked the fact that, to be valid, the makeup of the senate must positively complement the makeup of the house, to provide the vital equality of voter representation. Both houses of the legislature seemingly forgot that the schemes of districting *each* house, when conjoined, must offer compensating advantages to the voters—not only to those voters within each representative district, be it senate or house, but to all voters throughout the State. While there perforce

must be some overlap of representation with the several senate and house districts, that overlap must not be such as to concentrate and intensify the voting power of a single senatorial-representative district to the point that the voters therein have a built-in disproportionate representational advantage over any other voters of the State.

If the achievement of this goal is even to be approached, there should not be any monolithic political units of representation in that all-inclusive system of apportionment. Unless, within any single geographically defined political area or unit, there is a meaningful and substantial difference in the composition of that body of electors therein, whose combined votes elect a senator, from that body whose combined votes elect a member of the house, then the demanded differing complexions and collective attitudes are lost, the necessary cross checking and resulting balance is absent, and the majorities therein are given a disproportional monolithic command, not only within the narrow political unit, but also within the legislative bodies. Such artificially concentrated political power negates any notion of equality of representation for the minorities entrapped therein, as well as for all other electors of the State outside such a monolithic political unit.

"However complicated or sophisticated an apportionment scheme might be, it cannot, consistent with the Equal Protection Clause, result in a significant undervaluation of the weight of the votes of certain of a State's citizens merely because of where they happen to reside." *WMCA* v. *Lomenzo,* 377 U.S. 633, 653.

The Hawaiian legislature, whether innocently or de-

signedly, has, nevertheless, built just such monoliths into its reapportionment scheme.

In its effort to achieve its objective of multi-member (three and four) senatorial districts in Honolulu, the legislature made the boundaries of the third senatorial district and the eighth representative district one and the same. Thus from *one* political and geographical unit would be elected four representatives and three senators—seven members of the legislature all responsible to and representing exactly the same constituency! Similarly, the sixth senatorial district was fashioned almost entirely from the fifteenth representative district, with the result that from the fifteenth representative unit, i.e., from the dominant three-fourths of the voting population of that senatorial district, would come six representatives and four senators. (31,302 of the senatorial district's total of 40,629 voters reside in the fifteenth representative district.)

While it is a fundamental factor under the decisions of The Court, population is not the sole definitive measure for setting up either representative or senatorial districts. Compactness and contiguity of the territory are admittedly also factors, but community of interests, community of problems, socio-economic status, political and racial factors—each and all must be considered, and not only must the electoral districts be laid out with the totality of those factors having been taken into consideration, but even more, the sum total of all of the districting must result in substantial equality of meaningful representation to each and all of the voters of the State. "(A)ll who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation,

whatever their income and wherever their home may be in that geographical unit." *Gray* v. *Sanders,* 372 U.S. 368, 379. As indicated, not only was there no totality of consideration of the above factors in setting up the senatorial districts on Oahu, but there was even less totality of consideration of the factors of equal representation to all voters on Oahu and the rest of the State.

Here, the realistic political weight of the voters in both the third and sixth senatorial districts would far exceed the political weight of any voter in any other district, not only in Honolulu but in any other county of the State. It is patent to the court that both the house and the senate, in setting up the senatorial plan either failed or refused to recognize the effect that such a plan would have upon the basis for representation of the entire voting population. Both the Hawaiian senate and house ignored the admonition of the Supreme Court:

"(I)n reviewing a state legislative apportionment case this court must of necessity consider the challenged scheme *as a whole* in determining whether the particular State's apportionment plan, in its entirety, meets federal constitutional requisites. It is simply impossible to decide upon the validity of the apportionment of one house of a bicameral legislature in the abstract, without also evaluating the actual scheme of representation employed with respect to the other house. Rather, the proper, and indeed indispensable, subject for judicial focus in a legislative apportionment controversy is the overall representation accorded to the State's voters, in both houses of a bicameral state legislature." *Maryland Committee* v. *Tawes,* 377 U.S. 656, 673. (Emphasis added.)

This court heretofore said that the house was not unconstitutionally apportioned. This court indicated the means by which the senate could be apportioned to give to every voter the equal protection and equal representation that he is entitled to without disturbing the makeup of the house, but because both houses failed to look at the political scene in its totality and instead viewed the reapportionment scheme of the senate as if it were something that could be fashioned without consideration of its tight juxtaposition to the house of representatives, each house of the legislature jointly and separately took such a myopic view of the political problem involved, that they failed to see and anticipate the overall result of arbitrarily joining their independently constructed senatorial plan with the existing representative scheme.[5] As indicated, both houses failed to heed the words of the Supreme Court, as well as any of the red lights this court had flashed. Both houses failed to heed the advice of the Attorney General of the State of Hawaii, and the end result, based as it is upon reasons which fall very, very short of justifying the resultant multi-member districting of both houses, fails to give to each and every voter of the State of Hawaii the fundamental equality of representation to which each is entitled under the Fourteenth Amendment.

Even if the above, alone, were not enough to render the proposed scheme invalid, it is manifest to this court that the legislature's adamant insistence on three and

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[5] As foretold in *Fortson* v. *Dorsey*, 379 U. S. ..... (1965) "it might well be that, designedly or otherwise, a multi-member constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population."

four-member senatorial districting was the conscious or unconscious—though not unnatural—reluctance of the affected senators to carve out single-member districts which thereafter would in all probability result in a political duel-to-the-death with a fellow and neighbor senator. To have cross-cut any of Honolulu's eighth, twelfth or fifteenth representative districts in order to mark out single-member senatorial districts would, with practical certainty, have left two or three present incumbents to compete head on for a single senatorial seat.

Likewise, the shift on Hawaii from the double, 2–1 senator district scheme, tentatively adopted on March 18th, to the single 3-senator district in the instant plan, was an unmistakable application to East Hawaii's incumbent senators of that same factor of political self-preservation implanted into the Honolulu districting scheme.[6]

This court finds that the present multi-member district scheme of senatorial reapportionment resulted, in a material part at least, from gerrymandering.

We find the proposed plan does not meet the test of equality of representation set down by our Supreme Court and is invalid. We therefore do not approve the plan.

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[6] "(I)n the absence of any reasonable justification (historical or otherwise), such districting (creation of single-member and multi-member districts) might be the result of gerrymandering for partisan advantage and, in that event, would be arbitrary and capricious. In the light of the constitutional pitfalls inherent in such a districting scheme, it would be more prudent to approach the matter of apportionment by setting up single-member districts unless valid and compelling reasons exist which require the creation of some multi-member districts." *Butcher* v. *Bloom*, 203 A.2d 556, 573.

Circuitous or expensive as it may be, the route set out by the Constitution of this State, viz., by way of a constitutional convention, must now be followed. Inasmuch as the plan set forth in H.B. 987 cannot be and is not approved by this court, IT IS THEREFORE ORDERED:

(1) The stay order of this court dated April 19, 1965, is rescinded, effective forthwith; and

(2) As indicated in our Final Order of March 19, 1965, item 4 on pages 19-20, and item 6 on pages 20-21 of the Decision and Order of this court dated February 17, 1965, be and they are hereby automatically reinstated and now remain and shall continue in full force and effect until further order of this court.

As may be noted, this court has not herein discussed H.B. 773. We are advised that it was able to pass the senate by but the barest majority, 13 - 12, far short of the two-thirds demanded by the State constitution for the adoption of a proposed constitutional amendment. The same also has not yet lain on the desk of the Governor for the ten days prior to final adoption, as provided by the constitution.[7] Therefore, procedurally, the same has not yet been submitted to us. *Wright* v. *Rockefeller*, 376 U.S. 52, 58. Even if it were, nevertheless, in view of our decision on the provisional plan, H.B. 987, we would not and now do not find it neces-

[7] In order to move the reapportionment problem with the greatest celerity, this court, nevertheless, had advised all parties that a provisional plan of reapportionment could be submitted to this court and a hearing had thereon immediately after the same was passed by the legislature and before the ten-day period during which a proposed amendment must lie on the desk of the Governor before the same can be adopted and passed. The instant hearing therefore was solely upon the matter of the proposed provisional plan.

sary to consider the validity of the proposed amendment, H.B. 773, or the question proposed by HB. 986.

This court continues to retain jurisdiction of this action for all purposes.

This decision shall take effect forthwith.

Dated: Honolulu, Hawaii, this 28th day of April, 1965.

GILBERT H. JERTBERG
Circuit Judge

WILLIAM T. BEEKS
District Judge

MARTIN PENCE
District Judge

[R. 370]

DECISION AND ORDER

On August 13, 1964, the plaintiffs, citizens and residents of the State of Hawaii and qualified voters in their respective senatorial and representative districts, on their own behalf and as a class action on behalf of all other citizens, residents and voters in the State of Hawaii similarly situated, filed this complaint against William S. Richardson, Lieutenant Governor of Hawaii (he being responsible for the supervision of elections), seeking to enjoin Richardson from performing any duties relating to the nomination and election of candidates for State legislative offices unless the State legislature enacted a valid reapportionment plan for use in the 1964 elections, praying that this court should in any event make certain that

the 1966 election would be conducted under an apportionment plan that would meet the requirements of the Fourteenth Amendment to the Constitution of the United States.

Plaintiffs alleged that the Constitution of the State of Hawaii apportioned the senate on the basis of geography and not population, and the house of representatives on the basis of registered voters and not population, and thus the State's scheme of apportionment was unconstitutional under the Fourteenth Amendment, in the light of *Reynolds* v. *Sims*, 377 U.S. 533 (1964), and its companion cases of the same date: *Maryland Committee* v. *Tawes*, *Lucas* v. *Colorado General Assembly*, *Davis* v. *Mann*, *WMCA* v. *Lomenzo* and *Roman* v. *Sincock*.

The Governor of the State, as well as all state legislators, both senators and representatives, filed their appearance as either intervening plaintiffs or defendants. (After the 1964 elections, all but one of the newly elected legislators likewise filed their appearance.)

A three-judge district court thereafter convened, found that it had jurisdiction under 28 U.S.C. Secs. 2201 and 2281 et seq., as well as under the Civil Rights Act, 42 U.S.C. Secs. 1983, 1988, and the court, after full hearing, on August 26, 1964, because of the imminence of the 1964 elections and the disruptive effects which an injunction would have had thereon, and because the State legislature at that date was convened in special session for the specific purpose of considering the problems of reapportionment, denied the motion for a preliminary injunction and set a hearing on the merits for January 11, 1965. (*Cf. Roman* v. *Sincock, supra.*) The legislature failed to agree on any

reapportionment plan, and this decision follows the January hearing.

The Constitution of the State of Hawaii, after being hammered out at a Constitutional Convention composed of nonpartisan delegates elected from all parts of the Territory, was adopted July 22, 1950, to become effective immediately upon the admission of Hawaii into the Union as a state. Hawaii was so admitted on August 21, 1959. The Constitution prescribes a senate of 25 members, obviously and admittedly apportioned basically upon the geographical and political divisions of the State, and 51 representatives apportioned as hereinafter described.

Hawaii is unique in many respects. It is the only state that has been successively an absolute monarchy, a constitutional monarchy, a republic, and then a territory of the United States before its admission as a state. Because each was insulated from the other by wide channels and high seas (*C.A.B.* v. *Island Airlines*, —— F.Supp. —— (October 8, 1964)) and historically ruled first by chiefs and then royal governors, after annexation the seven major, inhabited islands of the State were divided up into the four counties of Kauai, Maui, Hawaii and the City and County of Honolulu.[1] All this resulted in a strongly centralized form of government.

By 1950, Honolulu, the State capital, had by far the largest population of any county, an essentially urban population, and had become an industrial, manufac-

[1] The artificial and isolated County of Kalawao has always been strictly a Hansen's disease treatment area, operated and controlled by the Board of Health of the Territory and State. It votes with Maui County for State Legislators.

turing, military and tourist center. The other three counties remained essentially rural and primarily concerned with agriculture and ranching. With the State having complete control over the judiciary, taxation, education, public health and welfare, etc., it was normal therefore that the three more rural counties of Kauai, Maui and Hawaii would not wish to leave such centralized power, particularly control over the State's purse strings, with urban Honolulu.

Patterning itself after the makeup of the United States Congress, Article III, Section 2 of the State Constitution apportioned the 25-member senate on a basis which enabled the senators of the three counties outside of Honolulu to have numerical control over that body. This was deliberately done in order to preserve the then nationally approved concept of checks and balances between rural and urban populations.

By Article III, Section 4, the house of representatives was apportioned under "the method of equal proportions," i.e., the same method as used in apportioning the members of the House of Representatives of the United States Congress,[2] giving the representatives from the County of Honolulu, with its larger population, potential control of the house. Both single and multi-member representative districts were set up throughout the State.

Under this same Section 4, using the method of equal proportions, the State legislators were apportioned among the four "basic areas," viz., the four counties,

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[2] Proceedings of the Constitutional Convention of Hawaii, Volume II, (Proceedings), pp. 112-123. See also, *Reynolds* v. *Sims*, *supra*, note 10.

on the basis of the number of voters registered at the last preceding general election, and within the counties each representative district had its representation determined by the same method.

Under this same Section 4, the governor was mandated to reapportion the members of the house of representatives on or before June 1 of the year 1959, and at successive 10-year intervals thereafter. On May 1, 1959 (pursuant to Public Law 895, 84th Congress, 2nd Session), the Governor of Hawaii did reapportion the State in the above manner, and such reapportionment transferred increasing control to Honolulu.[3]

All parties before this court conceded (as was also determined by the Supreme Court of Hawaii in *Guntert* v. *Richardson,* 47 Hawaii —— (July 27, 1964)) that Article III, Section 2, relating to the composition and apportionment of the State senate is indisputably invalid under *Reynolds* v. *Sims, supra.*

From the inception therefore, it was obvious that Hawaii's Constitution must be amended, at least to provide for a valid apportionment of its senate. In connection with any constitutional reapportionment of the senate, it must be noted that Article XV (Revision and Amendment), Section 2, para. 6, contains the following proviso:

". . . . provided, that no constitutional amendment altering this proviso or the representation from any senatorial district in the senate shall become effective unless it shall also be approved by a majority of the votes tallied upon the question in each of a majority of the counties."

[3] After the Constitutional Convention, Congress put into permanent effect the reapportionment provisions of the proposed State Constitution. (*Davis* v. *Quinn,* 43 Hawaii 261, 269).

As appears in the Proceedings, pp. 761-64, this proviso was specifically inserted in order to freeze representation in the senate, and it gave to the rural counties what amounted to the right of veto over any attempt to change the representative makeup of the senate. This proviso is so closely tied in with the admittedly invalid scheme of senatorial apportionment that it, too, is likewise constitutionally invalid and falls along with Article III, Section 2.

Plaintiffs urge that Article III, Sections 3 and 4, relating to apportionment of the house, are likewise invalid because they are a part of the total scheme of legislative apportionment, inferring that the house would not have been apportioned as it was but for the senate being apportioned as a built-in check in setting up the "checks and balance" scheme of the United States Congress.

This Court finds that this is not necessarily true. Apart from one problem discussed immediately below, nothing has been called to our attention and we find no evidence—not even in the Proceedings—that the Constitutional Convention would have apportioned the house in any other way than it did.[4]

Plaintiffs urge that in any event, the house of representatives is unconstitutionally apportioned because

[4] In connection with both the senate and the house of representatives, plaintiffs have claimed that the *number* of legislators in each house, viz., 25 and 51, are part of some invidious scheme. Exhibit 14, Table 14 clearly illustrates that there is no built-in magic or invidiousness in the use of such numbers. The matter of the size of each legislative body and the adoption of a 15-member senate and 31-member house, or a 21-member senate and 41-member house, as well as the ultimately approved 25-member senate and 51-member house were thoroughly explored by the Convention. (Proceedings, pp. 89-101, 112-132)

apportionment thereof is based upon the number of voters registered at the last preceding general election (Art. III, Sec. 4), and not upon a gross, i.e., total population basis.

Article II, Sections 1 and 2, covering suffrage and elections, provides, in substance, that every literate United States Citizen who is compos mentis and not an unpardoned felon, 20 years old or more, residing in the State not less than one year next preceding the election, and a registered voter, shall be qualified to vote. This court finds nothing in Article II which is constitutionally invidious as discriminating against any one on the basis of race, color, creed, employment or geographical location, and as indicated in Article III, Sections 2 and 3, defining who may elect senators and representatives, it appears that the term "qualified voters" is used practically synonymously with registered voters under Article III, Section 4.

This court is not prepared at this time to accept plaintiff's premise that total population is the *only* basis upon which apportionment of state legislatures can constitutionally be based. The Court in *WMCA* v. *Lomenzo, supra,* notes that "New York uses citizen population instead of total population, excluding aliens . . . , for purposes of legislative apportionment" and apparently found nothing invidious in that fact. In *Maryland Committee* v. *Tawes, supra,* The Court said:

"Rather, the proper, and indeed indispensable, subject for judicial focus in a legislative apportionment controversy is the overall, representation accorded to the *State's voters,* in both houses of a bicameral state legislature." (Emphasis added.)

The Court thus re-expressed what it said in *Gray* v. *Sanders*, 372 U.S. 368, 379:

> "Once the geographical unit for which a representative is to be chosen is designated, *all who participate in the election* are to have an equal vote—whatever their race, . . . their income, and wherever their home may be in the geographical unit." (Emphasis added.)

The Court has said time after time throughout *Reynolds* v. *Sims, supra*, and the companion cases only that "both houses must be apportioned substantially on a population basis." (Emphasis added.)

Plaintiffs urge and have presented figures showing that on the basis of the 1960, 1962 and 1964 population, the house of representatives is malapportioned. To begin with, paraphrasing *Guntert* v. *Richardson, supra*, 1950 and 1958 registered voters, and 1960, 1962 and 1964 population, are not comparable figures. The Court does not demand that legislatures be reapportioned annually. *Reynolds* v. *Sims, supra*, Subject VIII. This court, at this time, can only determine if the basis of apportionment, when adopted in 1950 and when used for reapportionment in 1959, did in fact at those times result in apportionment "substantially on a population basis."

The Convention tried "to write into this Constitution a proposal that would not deny a single individual in this territory the right to suffrage." (Proceedings, p. 49). The basis of apportionment by population vs. registered voters was thoroughly discussed.

> "The idea among other things was to make the districts as nearly equal population-wise as possible. . . ." (Proceedings, p. 107)

. . . .

"One of the reasons why the reapportionment directed by the Organic Act[5] was not carried out was because that act required reapportionment on the basis of citizen population. A breakdown of the population according to this standard has not been locally available. Total population figures for the territory are shown by census tracts which do not necessarily coincide with locally defined areas. As a practical matter, the number of registered voters was found to bear a reliable and fairly uniform relationship to total population, although it favors slightly the neighbor islands where the percentage of persons who have registered to vote is from one to two per cent higher than for Oahu. It was in recognition of the potential difficulty in obtaining figures which would show citizen population, or figures which would show total population by desirable districts, that the basis for reapportionment of the members of the House was chosen as the number of registered voters." (Proceedings, p. 107)

"The problem as stated in the report and as stated by the committee chairman this morning of using population in these districts is that it is next to impossible to obtain accurate population figures for the districts that we want to use or even for the old precincts or for any districts, unless you should take your representative districts to be the same districts that are used by the Census Bureau. Now it is quite possible that by the next census we could convince the Census Bureau that they should break their areas up into the areas that we may decide upon for representatives.

". . . . [I]n checking this over in the committee we found that there was actually percentage wise or using the method of equal proportions or anything

[5] Organic Act, Secs. 60, 62.

else, very little difference whether we used registered voters, votes cast or population." (Proceedings, p. 124)

The testimony of Robert Schmitt[6] (see Transcript of Proceedings of August 1964 hearings (TR) beginning p. 80) illustrated with certainty that the term "population" as determined by the Census Bureau was far from an accurate or reliable method of determining the true number of *residents* of a given area—at least in Hawaii.

"The 1960 Census definition of population used in its compilation, ... included all armed forces stationed ashore in Hawaii, regardless of their legal or voting residence. It included all men aboard ships in Hawaii ports on the census date . . . April 1st, 1960; that is [if] a ship tied up in Kapalama Basin or in Pearl Harbor, Ford Island, the entire crew of that ship was assigned to that geographic area.

"This was also true in the case of civilian ships. For example, the Ala Wai Yacht Harbor included a number of house boats and yachts which were enumerated in Hawaii." (TR 80)

". . . If the person on the night preceding the census had been there . . . each hotel or transient accommodation was enumerated. . . .

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[6] Robert Schmitt: employed by the Department of Planning and Economic Development of the State of Hawaii; a member of the American Statistical Association; member of the Population Association of America and author of some 60 articles in professional journals; Research Development Analyst in charge of the Research Division of the Honolulu Redevelopment Agency for four years; in charge of research for the Seattle City Planning Commission; author and editor of the Statistical Abstracts of Hawaii; census tract key person for Honolulu of the U. S. Bureau of Census for many years; holds a Master's Degree from the University of Cincinnati, with additional graduate work from the University of Hawaii, University of Michigan and the University of Washington. (TR 69-70)

"[T]hey enumerated every person in Hawaii at that time, but they then reallocated them to their home states. . . ." (TR 81)

". . . We don't know how many were here at that time. *But we made an estimate.* . . . The Census Bureau did *not* report how many such persons were reallocated." (Emphasis added.) (TR 82)

". . . There is no certainty how many were reallocated. We assume that all of them were." (TR 83)

"There were two ships [picked up in the 1960 census], one the Kiwishiwi . . . and the other the Black Hawk. . . . [T]he total personnel of perhaps four hundred . . . were assigned to [an area of Waikiki along the Ala Wai Canal]. . . . [H]ere we had approximately four hundred of the ship's crews . . . classified as military . . . who were assigned to this [Waikiki] enumeration district. . . .

"[I]n 1920 . . . they inadvertently threw 3,000 Pearl Harbor people into the . . . Honolulu judicial district." (TR 106-07)

"In 1960, the number of members of the Armed Forces . . . was either 54,000 or 47,000 . . . [or 42,122 if we subtract the 1960 civilian population of 590,650 from 632,772—See Ex. 14, p. 12], the census count was 47,000, and the Department of Defense counted 54,000." (TR 116)

Since the total civilian population of Hawaii (excluding the military) in 1960 was but 585,505 (Ex. 14, Table 12), it is seen that the military did account for about 10% of the total population. (1960 Census estimate, Ex. 15, Table 9.) Hawaii has become the United States' military bastion for the entire Pacific and the military population in the State fluctuates violently as the Asiatic spots of trouble arise and disappear. If total population were to be the only acceptable criteria

upon which legislative representation could be based, in Hawaii, grossly absurd and disastrous results would flow from a blind adherence to "the elusive 'one person-one-vote' aphorism." (Mr. Justice Harlan in *Fortson v. Toombs,* —— U.S. ——, (January 18, 1965.)

For example, if Hawaii's reapportionment year had been 1944, when the civilian population was 464,250 and the military population was 407,000, then areas which normally might have a total population entitling them to but a small percentage of the total number of legislators would suddenly find themselves controlling over 90% of the legislature—for the following ten years!

In contrast to the above, in 1950, with a civilian population of 472,780, there were but 21,000 military in Hawaii—less than 5%. In two years, this had jumped to 55,000. In 1958 there were 55,000 military, with a civilian population of 555,222. Two years later, there were 79,000 military in Hawaii. (Ex. 15, Table 11) As the plaintiffs have admitted, if the State were reapportioned at the present time on a straight total population basis, the *Fifth* senatorial district, containing within its bounds most of the military and naval installations of the State, would be entitled to 13 senators—a majority of the Senate!

A theoretical proposed redistricting of the City and County of Honolulu (Ex. 8) based on total population under the *1960* census, with the primary consideration being substantial equality of *total population*, gave Oahu 20 senators out of 25, and 41 representatives out of 51. (TR 189—Schmitt) A result of such proposed redistricting was that the largest representative district in point of population would be the one that in-

cluded Schofield Barracks "in fact, it is completely Schofield Barracks," (TR 190) i.e., military population. Although it would thus become the largest representative district in the State, "in point of registered voters [it would be] the smallest district on the island." (TR 191) And Schmitt admitted, in testifying concerning Exhibit 17, that it was possible in a single representative district so reapportioned on a total population basis, for such a district to have almost no voters at all.

This court does not have before it the problem presented to the Supreme Court of Hawaii, in *In Re Robertson, Jr.*, 48 Hawaii —— (October 30, 1964), viz., the question of whether a service man's residence on a Federal military reservation precludes him from establishing his residence in Hawaii. If he so desires to become a resident of Hawaii, this court can only state that there is nothing in the State Constitution or the Hawaii statutes which per se excludes members of the armed forces from establishing their residence in Hawaii and thereafter becoming eligible to vote. This court finds no scheme in Hawaii's Constitution or in the statutes implementing the exercise of franchise which is aimed at disenfranchising the military or any other group of citizens.

Not only does the fluctuating military population of the State make representation on the basis of total population politically suspect, but the large number of tourists[7] who continually flow in and out of the State and who, as above indicated, for census purposes are

[7] The Hawaii Visitors Bureau statistics show that tourists in Hawaii, for overnight or longer, numbered—in 1950, 46,593; in 1958, 171,588; in 1960, 296,517; in 1962, 362,145; in 1964, 510,000 (preliminary figure).

initially at least, counted as part of Hawaii's census population (10,000 estimated, 1960 census), would likewise result in gross inequity to citizens of the State eligible to vote, if total population were held to be the only constitutional basis for reapportionment in Hawaii.

The difficulties undoubtedly faced by the Constitutional Convention in determining the best method to set up a system giving equality of representation is further illustrated by references contained in Exhibit 14 on statistics based on the year 1960—not the year 1950 when the Constitution was adopted, or 1959 when the house of representatives was reapportioned. Exhibit 14, Table 1 shows that the total *civilian* population as of July 1st, 1960 was 590,650, with 202,059 registered voters or 34.2% registered. Table 3 shows the *total* population as 632,772, thus indicating but 31.9% of the population as having registered. Table 4, however, shows that out of the State population of 312,478 *United States citizens* (thus including the military) of voting age, the 202,059 registered voters accounts for 64.7% of all that class. Table 5 indicates that out of the *total* population age 20 or over (thus including non-citizens), of 360,193, 231,914 could qualify as being eligible to register. Thus even in 1960, the registered voters actually accounted for 87.1% of all of the possible *voting population* of the State of Hawaii.

That, in Hawaii, apportionment on a registered voter basis is not invidious per se, is further illustrated by Exhibit 14, Table 13, wherein it appears that 19 senators would be apportioned to Honolulu regardless of whether the basis was registered voters in the 1962 election or civilian population. Likewise, there is

shown but a difference of two representatives (38 - 40) for Honolulu in such projected apportionment of the house, a difference which might result from the application of the method of equal proportions.

Hawaii's centralized education system has resulted in an unusually literate citizenry, and interest in politics and strong drives to bring out the vote have resulted in a vote of from 88 to 93.6% of all registered voters during the elections of 1958, 1959,[8] 1960 and 1962. (Ex. 14, p. 12)

Representation based upon those eligible to vote, rather than registered voters, might conceivably have been a better solution, but neither in 1950 nor in 1958, as Schmitt testified (TR 96-98), was there statistical data available from which the necessary figures could have been gleaned and applied to the representative districts. As he also said, any attempt to determine the number of military personnel or their dependents who are eligible to vote in Hawaii by representative district "would strain the available statistical sources to the breaking point." (TR 98)

This Court does not hold that registered voters as a basis for representation is the perfect basis. Paraphrasing the words of The Court in *Fortson* v. *Dorsey*, —— U.S. ——, this court finds the use of registered voters as a basis of apportionment did not, in Hawaii, in fact "designedly or otherwise . . . operate to minimize or cancel out the voting strength of [any] . . . elements of the voting population." (At p.——) Nor did it in 1959 bring about that result.

As the records of the Constitutional Convention

[8] First political implementation under Statehood.

show (Proceedings 103-111), the districting, both for the senate and the house of representatives, followed along historical, political, geographic and physical lines. There was no gerrymandering in the invidious sense. As Dr. Schmitt testified (TR 96), the representative district lines sometimes cross statistical matters reported in the census, because the census divided up the State into census tracts. While for some of the cities of the State block statistics are available, nevertheless it is rather rare when the census tract coincides with the precinct in an election district. "There seems to have been an unfortunate disregard of precinct boundaries and representative district boundaries in laying out the census tracts and vice versa." (TR 96)

Plaintiffs have pointed to the result of the redistricting in Representative Districts Nos. 1 and 2—Puna and South Hilo on the Island of Hawaii—as proof positive that the districting brought about a result condemned in *Reynolds* v. *Sims, supra,* as unconstitutional, in that in 1959, given a man-average per representative of 3437 voters, Puna with a 1958 registered voter population of about 2209 was given one representative and South Hilo with a registered voter population of 13,836 was given but three (i.e., 4459 voters per representative)—ergo an arbitrary and invidious dilution of the votes of the South Hilo voters! While The Court did state:

> "It is inconceivable that a state law to the effect that, in counting votes for legislators, the votes of citizens in one part of the State would be multiplied by two, five, or 10, while the votes of person in another area would be counted only at face value, could be constitutionally sustainable",

this broad conclusion, however, was modified a few lines thereafter by the following:

"Weighting the votes of citizens differently, by any method or means, *merely* because of where they happen to reside, hardly seems justifiable." *Reynolds* v. *Sims, supra.* (Emphasis added.)

As was also stated by Mr. Justice Black in *Colegrove* v. *Green,* 328 U.S. 549, 569-71:

"[T]he constitutionally guaranteed right to vote and the right to have one's vote counted clearly imply the policy that state election systems, no matter what their form, should be *designed* to give *approximately* equal weight to each vote cast. . . ." *Reynolds* v. *Sims, supra,* note 40. (Emphasis added.)

The record of the Proceedings (pp. 139, 141, 157) shows that in an endeavor to make all of the representative districts of the State large enough so that the figures would approach the 1950 common denominator of 2445, Puna (1st Representative District), when combined with Keaukaha (now in the 2nd Representative District) came to 2355. The delegates from South Hilo opposed this because geographically Keaukaha was separated from the nearest inhabited portion of Puna by a lava forest over six miles wide, traversed by but one road. It was an integral part of the City of Hilo, using that city's power, water, police, fire protection, schools and all public services. Its population was almost entirely of Hawaiian extraction; almost all of its inhabitants were employed only in Hilo; and basically, it had no community, ethnic or industrial bond or interest with Puna.

The voting population of Puna, on the other hand, was very predominantly of Japanese extraction, with

no urbanization whatsoever, and with almost its entire population employed by one sugar plantation.

Keaukaha had 644 voters. It was recognized that the 1711 voters of Puna ethnically, industrially and socially were a cohesive unit, and such districting, as a matter of practical politics, would have left Keaukaha with *no* real representation.

> "[Keaukaha] was put in Puna in the first place . . . [in] . . . an effort to get a larger number of voters in the district that was going to elect one representative. It should be the natural thing to put it in South Hilo as [the delegates from Hawaii County] propose to do it now and it would not disturb the allocation of voters between Puna and South Hilo, and North Hilo and Hamakua." (Proceedings, p. 157)

As a matter of fact, also, neither in Puna nor in South Hilo did the resultant number of voters per representative, then or in 1959, violate the method of equal proportions. This court finds ample justification for and no invidious vote dilution in the above districting.

As indicated above, this court cannot say that Hawaii's method of districting was part of any invidious scheme to disenfranchise any person or group, or to dilute the vote of any person. In hindsight, this court could say, as did Dr. Schmitt, that for the purpose of determining eligibility to vote in any precinct or district, it would be far easier to secure some such information if the districting and precinct lines also coincide with the census county divisions and census tracts. (TR 96)

There is nothing which appears in the Proceedings (pp. 173-74) to indicate that the ordering of reapportionment of the house in the year preceding that in

which the census is normally taken was part of a scheme to dilute the vote of any person, rather, that year was used because the 5th Legislative Session after the Constitutional Convention would have terminated its work in May 1959. Since reapportionment was based upon registered voters, the census figures did not appear to the delegates to have any application.

Obviously, if the rights of the citizens of Hawaii are to be protected, the Constitution of the State of Hawaii must be amended—and amended before the 1966 general elections. The action of the legislature in failing to provide for reapportionment during its special session called for that purpose only last summer was disappointing to this court—and undoubtedly to the Supreme Court of Hawaii. See *Guntert* v. *Richardson, supra.*

As pointed out by the Supreme Court of Hawaii in *Guntert*, any change in the representation from any senatorial district must be by constitutional amendment. This court concurs!

Under Article XV, Section 3 of the Hawaii Constitution, while the legislature may propose amendments to the Constitution, such amendments can only be voted on at a general election. If the legislature at its special reapportionment session of 1964 had proposed any reapportionment amendment, it could have been voted on in the 1964 election, but that legislature did not so act. Having determined that the senate at least, must be reapportioned before the 1966 general election, this court, in the inception, is now compelled to attempt to achieve that result by following the constitutional method provided under Article XV, Section 2. In the event that the constitutional route fails or, if followed,

produced an invalid scheme of apportionment, only then would this or any other court be justified in attempting to assume the Herculean task of devising and enforcing a temporary reapportionment system.

In the event that a Constitutional Convention is convened, then in view of the questions and problems which have been raised before this court in this case, as well as before the Supreme Court of Hawaii in *Guntert* v. *Richardson, supra*, the delegates, in addition to providing for reapportionment of the senate, may also wish to reconsider the question of:

1. Whether it will continue to use registered voters as the apportionment basis, or change it to State citizen population eligible to vote (i.e., voter population), or citizen population, or total population.

2. Whether it is better to have one or both houses of the legislature composed of single member representative districts, or to have and justify[9] one or both houses composed, in whole or in part, of multi-member or floterial districts.

3. Whether decennial reapportionment of either or both houses should be made on or before June 1st of the year preceding the Federal census—as is now the case—or on a date soon after the taking of such census.

4. Whether the representative district lines should remain substantially as they now are or whether ultimately (i.e., after 1970) there should be redistricting in such a manner that the census tracts and representative districts can be coordinated for the statistical purposes necessary to implement the changes (if any) made in the basis of apportionment.

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[9] *Butcher* v. *Bloom*, 203 A.2d 556, 572-73.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

1. Those provisions of Article III, Section 2 of the Constitution of the State of Hawaii fixing the number of senators per senatorial district are hereby declared unconstitutional and invalid. The remainder of Article III of said constitution is declared constitutional and valid.

2. The proviso at the end of the sixth paragraph in Section 2 of Article XV pertaining to amendments affecting representation in the Senate is hereby declared unconstitutional and invalid. The remainder of Article XV is declared constitutional and valid.

3. The plaintiffs and intervening plaintiffs have failed to prove that the apportionment of the House of Representatives of the Legislature of the State of Hawaii causes any invidious discrimination in the weight of their vote or that such apportionment is the result of arbitrary or capricious action. Their prayers for relief in this respect are therefore denied.

4. This court will not interfere with the convening or conducting of the business of the Third State Legislature in regular session in 1965, save and except that the parties herein are hereby enjoined from taking final action upon any legislation, except such actions as are necessary to organize the respective houses at such session and appropriate funds for the session, until legislation, pursuant to the provisions of Article XV of said Constitution providing for the submission to the people of Hawaii, by special election to be held not later than August 1, 1965, the question: "Shall there be a convention to propose a revision of or amendments to the constitution?", and for any and all acts

required by law to implement such legislation, has been enacted into law. Such legislation shall also provide that if the vote be in the constitutional affirmative, then a special election shall be held not later than September 15, 1965 to elect delegates to the convention in the manner provided in the Constitution. Such legislation may include legislative action under Article XV, Section 2, 4th paragraph, of the Constitution. Such legislation shall further provide that the convention convene not later than October 15, 1965 and that it conclude its deliberation in time to submit its proposed constitutional amendments to the electorate of Hawaii at a special election to be held not later than January 30, 1966, including (but not limiting the convention thereto) provisions therein for reapportioning the Senate of Hawaii on a constitutionally valid basis. Such legislation shall also appropriate and make available funds for the expenses of such elections and convention.

5. The offices of all senators of the Hawaii State Senate are hereby declared vacant as of the day of the general election of 1966. Until such date, the existing offices of all senators elected under Article III, Section 2 of the Constitution, shall be valid.

6. This court retains jurisdiction of this action for all purposes, including but not limited to (a) considering such sanctions as may be appropriate if the orders of this court are not carried out; (b) judicially reapportioning the Senate in the event that the electors of Hawaii reject a constitutional convention, or the convention fails to propose an amendment reapportioning the Senate, or the electors reject such an amendment, or if any amendment of the convention does not insure the apportionment of the Hawaii State Legislature in

accordance with the requirements of the Equal Protection Clause of the 14th Amendment to the Constitution of the United States.

7. All other relief prayed for in the Complaint, Complaint in Intervention, and Cross Complaint is hereby denied.

DATED: Honolulu, Hawaii, this 17th day of February, 1965.

GILBERT H. JERTBERG
Circuit Judge

WILLIAM T. BEEKS
District Judge

MARTIN PENCE
District Judge

[R. 454]

FINAL ORDER ON MOTION TO ALTER OR AMEND JUDGMENT

As stated in this court's Decision and Order of February 17, 1965, a plan reapportioning the Senate of Hawaii must be operative for the 1966 general election, and this court did not in February and does not now wish to assume the task of devising a reapportionment scheme. Faced with the legislature's failure to act during its special reapportionment session of 1964, this court then felt compelled to channel reapportionment measures into the constitutional convention route.

Based upon the current actions of the legislators, followed by the representations by counsel for all parties to this suit that all are in accord with the objectives outlined in the motion to alter or amend

judgment, this court is now convinced that the legislative climate has changed and that the legislators presently in session are now prepared to undertake the formulation of a plan for reapportioning the Senate which can be Constitutionally justified. From the representations made, this court is satisfied that the multiple and accelerated special elections and a constitutional convention would cost well over $1,000,000, strain the State's election machinery, and force an as-yet-unsought-for constitutional convention upon the people of Hawaii, with attendant loss of time to the delegates.

This court is therefore prepared to grant the motion of intervenor-defendants Nelson K. Doi et al., and Elmer F. Cravalho et al., to alter the court's Decision and Order of February 17, 1965.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that this court's order of February 17, 1965 be and is hereby altered in the following particulars. Item 4 beginning at the bottom of page 19, and item 6 beginning at the bottom of page 20, are amended to read as follows:

"4. The Senate shall be apportioned on the basis of the number of voters registered at the 1964 general election substantially in the manner outlined by the reapportionment plan for the Senate, set forth in Senate Concurrent Resolution No. 35, adopted by the Legislature of the State of Hawaii on March 1, 1965, and attached to the Motion to Alter or Amend Judgment filed in this court on March 1, 1965. Any such reapportionment plan shall apply to the 1966 elections and thereafter until an appropriate and legal constitutional amendment shall become effective.

"In furtherance of the above, the legislators and parties herein are enjoined from taking final action upon any legislation, except such actions as are necessary to organize the respective houses at such session and appropriate funds for the session, until the State legislature in regular session in 1965:

"(a) shall have enacted a reapportionment and redistricting plan for the Senate on the basis of 1964 registered voters (and applicable to the 1966 elections) and the same shall have become law;

"(b) shall have adopted a proposed constitutional amendment embodying pertinent provisions of the foregoing reapportionment and redistricting plan, to be presented to the electorate for ratification at the 1966 general election, in the manner provided by Article XV, Section 3, of the State Constitution; and

"(c) shall have enacted legislation, pursuant to the provisions of Article XV of the State Constitution, providing for submission to the people of Hawaii at the general election of 1966 the question: 'Shall there be a convention to propose a revision of or amendments to the Constitution?'."

"After (a), (b) and (c) shall have been enacted and adopted, and made operative, the same shall thereupon be submitted to this court for approval.

"If the measures set forth in paragraphs (a), (b) and (c) above shall not have been enacted and adopted by the legislature on or before the twentieth calendar day following the date of the order granting the motion to amend the said Decision and Order, and made operative, and if the same after hearing shall not have been approved by the court, then, as far as then and

thereafter applicable, item 4 on pages 19 and 20 and item 6 on pages 20 and 21 of the Decision and Order dated February 17, 1965 shall become automatically reinstated and thereafter remain in full force and effect as if the Motion to Amend the same had not been granted.

* * * * * * * * *

"6. This court retains jurisdiction of this action for all purposes, including but not limited to:

"(a) considering such sanctions as may be appropriate if the orders of this court are not carried out; and

"(b) judicially reapportioning and redistricting the Senate, in the event that the obligations of the parties above indicated are not fulfilled, or any reapportionment plan so enacted is not approved by the court, or the electors of Hawaii at the 1966 general election reject the proposed and court-approved constitutional amendment reapportioning the Senate, or under any other circumstances which this court shall deem appropriate."

In all other respects this court's Decision and Order of February 17, 1965 is reaffirmed.

Dated: Honolulu, Hawaii, this 9th day of March, 1965.

GILBERT H. JERTBERG
Circuit Judge

WILLIAM T. BEEKS
District Judge

MARTIN PENCE
District Judge

[R. 534]

MOTION TO ALTER OR AMEND ORDER OF MARCH 9, 1965

Intervenors-Defendants move the court to extend the twenty (20) day calendar period ending March 29, 1965, referred to in the third paragraph, page 3, of the court's Final Order of March 9, 1965, for an additional period of sixteen (16) calendar days after March 29, 1965.

DATED: Honolulu, Hawaii, March 29, 1965.

* * * * * * * *

[R. 535]

ORDER

GOOD CAUSE APPEARING THEREFOR, the foregoing Motion to Alter or Amend Order of March 9, 1965 is approved and allowed.

DATED: Honolulu, Hawaii, March 29, 1965.

/s/ MARTIN PENCE
Judge of the above-entitled Court

APPENDIX B

1. The Fourteenth Amendment to the Constitution of the United States.

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. Article III, Sections 1, 2, 3, 4 and 5, of the Constitution of the State of Hawaii.

ARTICLE III

THE LEGISLATURE

LEGISLATIVE POWER

Section 1. The legislative power of the State shall be vested in a legislature, which shall consist of two houses, a senate and a house of representatives. Such power shall extend to all rightful subjects of legislation not inconsistent with this constitution or the Constitution of the United States.

SENATE; DISTRICTS; COMPOSITION

Section 2. The senate shall be composed of twenty-five members, who shall be elected by the qualified voters of the respective senatorial districts. The districts, and the number of senators to be elected from each, shall be as follows:

First senatorial district: that portion of the island of Hawaii known as Puna, Hilo and Hamakua, five;

Second senatorial district: that portion of the island of Hawaii known as Kau, Kona and Kohala, two;

Third senatorial district: the islands of Maui, Molokai, Lanai and Kahoolawe, five;

Fourth senatorial district: that portion of the island of Oahu lying east and south of Nuuanu Street and Pali Road and the upper ridge of the Koolau Range from the Nuuanu Pali to Makapuu Point and all other islands not specifically enumerated, five;

Fifth senatorial district: that portion of the island of Oahu lying west and north of the fourth senatorial district, five; and

Sixth senatorial district: the islands of Kauai and Niihau, three.

HOUSE OF REPRESENTATIVES; COMPOSITION

Section 3. The house of representatives shall be composed of fifty-one members, who shall be elected by the qualified voters of the respective representative districts. Until the next reapportionment, the representative districts and the number of representatives to be elected from each shall be as set forth in the Schedule.

REAPPORTIONMENT OF HOUSE

Section 4. On or before June 1 of the year 1959, and of each tenth year thereafter, the governor shall reapportion the members of the house of representatives in the following manner: The total number of representatives shall first be reapportioned among four basic areas, namely, (1) the island of Hawaii, (2) the islands of Maui, Molokai, Lanai and Kahoolawe, (3) the island of Oahu and all other islands not specifically enumerated, and (4) the islands of Kauai and Niihau, on the basis of the number of voters registered at the last preceding general election in each of such basic areas and computed by the method known as the method of equal proportions, no basic area to receive less than one member. Upon the determination of the total number of representatives to which each basic area is entitled, such total shall be reapportioned among the one or more representative districts within each basic area on the basis of the number of voters registered at

the last preceding general election within each of such representative districts and computed by the method known as the method of equal proportions, no representative district to receive less than one member. Upon any reapportionment, should the total number of voters registered in any representative district be less than one-half of the quotient obtained by dividing the total number of voters registered in the State by the total number of members to which the house is entitled, then, as part of such reapportionment, the basic area within which such representative district lies shall be redistricted by the governor in such manner that the total number of voters registered in each new representative district therein shall be more than one-half of such quotient.

The governor shall thereupon issue a proclamation showing the results of such reapportionment, and such reapportionment shall be effective for the election of members to such house for the next five succeeding legislatures.

MANDAMUS

Original jurisdiction is hereby vested in the supreme court of the State to be exercised on the application of any registered voter, made within thirty days following the date specified above, to compel, by mandamus or otherwise, the governor to perform the above duty; and made within thirty days following the date of such proclamation, to compel, by mandamus or otherwise, the correction of any error made in such reapportionment.

ELECTION OF MEMBERS; TERM

Section 5. The members of the legislature shall be elected at general elections. The term of office of members of the house of representatives shall be two years beginning with their election and ending on the day of the next general election, and the term of office of members of the senate shall be four years beginning with their election and ending on the day of the second general election after their election.

3. Article XVI, Section 1, of the Constitution of the State of Hawaii.

ARTICLE XVI

SCHEDULE
REPRESENTATIVE DISTRICTS

DESCRIPTION; NUMBER OF MEMBERS

Section 1. As provided in Section 3 of Article III until the next reapportionment, the representative districts and the number of members to be elected from each shall be as follows:

First representative district: that portion of the island of Hawaii known as Puna, one representative;

Second representative district: that portion of the island of Hawaii known as South Hilo, four representatives;

Third representative district: that portion of the island of Hawaii known as North Hilo and Hamakua, one representative;

Fourth representative district: that portion of the island of Hawaii known as Kau and South Kona and that portion of North Kona, for convenience herein referred to as Keauhou, more particularly described as follows: from a point at the seashore between the lands of Holualoa 1 and 2 and Puapuaa 2 running northeastly along the boundary of Holualoa 1 and 2 to Puu Laalaau; (2) easterly in a straight line to a point called "Naohueleelua" being the common corner of the lands of Puuanahulu, Kaohe and Keauhou 2nd; (3) southeasterly along the common boundary between Hamakua and North Kona districts to the summit of Mauna Loa; (4) westerly along the common boundary between Kau and North Kona districts to the easterly boundary of South Kona district; (5) northerly and westerly along the boundary between North and South Kona districts to the seashore; and (6) northerly along the seashore to the point of beginning, one representative;

Fifth representative district: that portion of the island of Hawaii known as Kohala and that portion of North Kona not included in the fourth representative district, one representative;

Sixth representative district: the islands of Molokai and Lanai, one representative;

Seventh representative district: the islands of Maui and Kahoolawe, five representatives;

Eighth representative district: that portion of the island of Oahu known as Koolaupoko and Koolauloa, two representatives;

Ninth representative district: that portion of the island of Oahu, for convenience herein referred to as Waialua and Wahiawa and a portion of Ewa known as Kunia and Waipio, more particularly described as follows:

Beginning at the seashore on the boundary between the Ahupuaas of Waimea and Pupukea and following along the North boundary of the Ahupuaa of Waimea to Puu Kainapuaa on the Koolau Range at the junction of the Ahupuaas of Laie, Waimea and Kawailoa, thence southeasterly along the top of the Koolau Range, passing over Puu Pauao and Puu Kaaumakua to the head of Kipapa Gulch, thence down along Kipapa Gulch in all its turnings and windings to Waiahole Ditch, thence southwesterly along Waiahole Ditch in all its turnings and windings to Reservoir No. 31 of the Oahu Sugar Company, thence following a direct line to Puu Palikea on the Waianae Mountain Range, thence northwesterly following along the top of Waianae Mountain Range, passing over Puu Kaua, Puu Kanehoa, Puu Hapapa, Puu Kumakalii, Puu Kalena, Puu Kaala to Puu Pueo, thence westerly along the boundary between the Ahupuaas of Kaena and Keawaula to the seashore at Kaena Point, thence easterly along the seashore to the point of beginning, two representatives;

Tenth representative district: that portion of the island of Oahu, for convenience herein referred to as

Ewa, (excluding Kunia and Waipio) and Waianae, more particularly described as follows:

Beginning at the seashore at Kaena Point, on the boundary between the Ahupuaas of Kaena and Keawaula, and following along said boundary to Puu Pueo on the Waianae Mountain Range, thence southeasterly along the top of the Waianae Mountain Range, passing over Puu Kaala, Puu Kalena, Puu Kumakalii, Puu Hapapa, Puu Kanehoa, Puu Kaua to Puu Palikea, thence following a direct line to Reservoir No. 31 of the Oahu Sugar Company, thence northeasterly along the Waiahole Ditch in all its turnings and windings to Kipapa Gulch, thence up along Kipapa Gulch in all its turnings and windings to the top of the Koolau Range, thence southeasterly along the top of the Koolau Range to the boundary between the Ahupuaas of Halawa and Moanalua, thence southwesterly along the boundary between the Ahupuaas of Halawa and Moanalua to the seashore, thence westerly along the seashore to the point of beginning, four representatives;

Eleventh representative district: that portion of the island of Oahu, for convenience herein referred to as Kalihi, more particularly described as follows: from the intersection of Kalihi and Auiki Streets running westerly along Auiki Street to Mokauea Street; (2) southwesterly along Mokauea Street Extension extended to a point on the outer edge of the reef; (3) westerly along the outer edge of the reef to a point on the Moanalua-Halawa boundary; (4) northerly and northeasterly along the Moanalua-Halawa boundary to the top of Koolau Range; (5) southeasterly along the top of Koolau Range to a place called "Puu Lanihuli"; (6) southwesterly along the top of the ridge between the lands of Kalihi, Kapalama and Nuuanu to Kalihi Street; and (7) southwesterly along Kalihi Street to the point of beginning, three representatives;

Twelfth representative district: that portion of the island of Oahu, for convenience herein referred to as upper Nuuanu, more particularly described as follows:

from the intersection of King and Kalihi Streets running northeasterly along Kalihi Street to the ridge between the lands of Kalihi, Kapalama and Nuuanu; (2) northeasterly along the top of said ridge to a point on the Koolau Range called "Puu Lanihuli"; (3) easterly along the top of said Range to Pali Road at the Nuuanu Pali; (4) southwesterly along Pali Road to Nuuanu Avenue and southwesterly along Nuuanu Avenue to School Street; (5) northwesterly along School Street to the center line of the Kapalama Drainage Canal (Waikiki Branch); (6) southwesterly along said Canal to the center line of the main Kapalama Drainage Canal; (7) southwesterly along said Canal to King Street; and (8) northwesterly along King Street to the point of beginning, three representatives;

Thirteenth representative district: that portion of the island of Oahu, for convenience herein referred to as Kapalama, more particularly described as follows: from the junction of the Honolulu Harbor Channel and the reef running westerly along the outer edge of the reef to Mokauea Street Extension extended; (2) northeasterly along Mokauea Street Extension extended to Sand Island Road; (3) northeasterly along Mokauea Street Extension to Auiki Street; (4) easterly along Auiki Street to Kalihi Street; (5) northeasterly along Kalihi Street to King Street; (6) southeasterly along King Street to the center line of the main Kapalama Drainage Canal; (7) northerly along said Canal to the center line of the Kapalama Drainage Canal (Waikiki Branch); (8) northeasterly along said Canal to School Street; (9) southeasterly along School Street to Nuuanu Avenue; (10) southwesterly along Nuuanu Avenue to the sea; and (11) southwesterly along the middle of Honolulu Harbor and Honolulu Harbor Channel to the point of beginning, three representatives;

Fourteenth representative district: that portion of the island of Oahu for convenience herein referred to as Pauoa, more particularly described as follows: from

the junction of the Honolulu Harbor Channel and the outer edge of the reef running northeasterly along the middle of Honolulu Harbor Channel and Honolulu Harbor to the intersection of Queen Street and Nuuanu Avenue; (2) northeasterly along Nuuanu Avenue to Pali Road and northeasterly along Pali Road to the top of the Koolau Range at the Nuuanu Pali; (3) easterly and southerly along the top of the Koolau Range to a point called "Puu Konahuanui"; (4) southwesterly along the top of the ridge between the lands of Nuuanu, Pauoa and Manoa to a mountain peak called "Puu Ohia" or "Tantalus"; (5) southwesterly along the top of the ridge between the lands of Makiki and Kalawahine to the intersection of Nehoa Street and Lewalani Drive; (6) southerly along Lewalani Drive and Piikoi Street to Wilder Avenue; (7) easterly along Wilder Avenue to Punahou Street; (8) southerly along Punahou Street to King Street; (9) westerly along King Street to Kalakaua Avenue; (10) southerly along Kalakaua Avenue to the center line of the Ala Wai Canal; (11) westerly along said Canal and along the line of said Canal extended to the outer edge of the reef; and (12) westerly along the outer edge of the reef to the point of beginning, five representatives;

Fifteenth representative district: that portion of the island of Oahu, for convenience herein referred to as Manoa and Waikiki, more particularly described as follows: from the intersection of Kalakaua Avenue and the center line of the Ala Wai Canal running northerly along Kalakaua Avenue to King Street; (2) easterly along King Street to Punahou Street; (3) northerly along Punahou Street to Wilder Avenue; (4) westerly along Wilder Avenue to Piikoi Street; (5) northerly along Piikoi Street to Lewalani Drive; (6) northerly along Lewalani Drive to Nehoa Street; (7) northeasterly along the top of the ridge between the lands of Makiki and Kalawahine to a mountain peak called "Puu Ohia" or "Tantalus"; (8) northeasterly along the top of the ridge between the lands of Pauoa, Manoa and Nuuanu to a point on the Koolau Range called "Puu

Konahuanui"; (9) southeasterly along the top of said Range to a place called "Mt. Olympus"; (10) southwesterly along the top of Waahila Ridge to the top edge of Palolo Valley; (11) southwesterly along the top edge of said Valley to the forest reserve boundary; (12) southwesterly along the southeasterly boundary of St. Louis Heights Tract, Series 2 (File Plan 464) to the southerly boundary of said Tract 100 feet southeasterly from Alencastre Street; (13) southwesterly parallel to and 100 feet from Alencastre Street and St. Louis Drive to Waialae Avenue; (14) westerly along Waialae Avenue to Kapahulu Avenue extended; (15) southerly across Waialae Avenue and along Kapahulu Avenue to Kalakaua Avenue; (16) westerly along Kapahulu Avenue extended to the outer edge of the reef; (17) northwesterly along the outer edge of the reef to a point on the line extended of the center line of the Ala Wai Canal; and (18) easterly along said line to the point of beginning, six representatives;

Sixteenth representative district: that portion of the island of Oahu, for convenience herein referred to as Kaimuki and Kapahulu, more particularly described as follows: from a point at the seacoast at a place called "Black Point" running westerly along the seacoast to Kapahulu Avenue extended to the sea; (2) easterly across Kalakaua Avenue and easterly and northerly along Kapahulu Avenue to Waialae Avenue; (3) easterly along Waialae Avenue to a point 100 feet easterly of St. Louis Drive; (4) northeasterly across Waialae Avenue then parallel to and 100 feet from St. Louis Drive and Alencastre Street to the southerly boundary of St. Louis Heights Tract, Series 2 (File Plan No. 464); (5) northeasterly along the southeasterly boundary of said Tract to the forest reserve boundary; (6) northeasterly along the top ridge of Palolo Valley to the top of Waahila Ridge; (7) northeasterly along the top of Waahila Ridge to a point on the Koolau Range called "Mt. Olympus"; (8) easterly along the top of the Koolau Range to the top of the ridge between the lands of Waialae Nui and Palolo; (9) south-

westerly along the top of said ridge to a place called "Kalepeamoa"; (10) southwesterly along Mauumae Ridge to Sierra Drive; (11) southwesterly along Sierra Drive to Waialae Avenue; (12) easterly along Waialae Avenue to 13th Avenue; (13) southwesterly along 13th Avenue and Ocean View Drive to Kilauea Avenue; (14) westerly along Kilauea Avenue to Makapuu Avenue; (15) southwesterly along Makapuu Avenue to Diamond Head Road; and (16) southeasterly along Diamond Head Road to the Military Road and along the Military Road extended to the point of beginning, four representatives;

Seventeenth representative district: that portion of the island of Oahu not included in any other representative district on the island of Oahu together with all other islands not included in any other representative district, three representatives;

Eighteenth representative district: the islands of Kauai and Niihau, four representatives.

Wherever a roadway, or the intersection of one or more roadways, is designated as a boundary in any of the above descriptions, the center line of such roadway or intersection is intended as such boundary.

4. Article XV of the Constitution of the State of Hawaii.

ARTICLE XV

REVISION AND AMENDMENT

METHODS OF PROPOSAL

Section 1. Revisions of or amendments to this constitution may be proposed by constitutional convention or by the legislature.

CONSTITUTIONAL CONVENTION

Section 2. The legislature may submit to the electorate at any general or special election the question, "Shall there be a convention to propose a revision of or amendments to the Constitution?" If any ten-year period shall elapse during which the question shall

not have been submitted, the lieutenant governor shall certify the question, to be voted on at the first general election following the expiration of such period.

ELECTION OF DELEGATES

If a majority of the ballots cast upon such question be in the affirmative, delegates to the convention shall be chosen at the next regular election unless the legislature shall provide for the election of delegates at a special election.

Notwithstanding any provision in this constitution to the contrary, other than Section 3 of Article XIV, any qualified voter of the district concerned shall be eligible to membership in the convention.

Unless the legislature shall otherwise provide, there shall be the same number of delegates to such convention, who shall be elected from the same areas, and the convention shall be convened in the same manner, as nearly as practicable, as required for the Hawaii State Constitutional Convention of 1950.

ORGANIZATION; PROCEDURE

The convention shall determine its own organization and rules of procedure. It shall be the sole judge of the elections, returns and qualifications of its members and, by a two-thirds vote, may suspend or remove any member for cause. The governor shall fill any vacancy by appointment of a qualified voter from the district concerned.

RATIFICATION; APPROPRIATIONS

The convention shall provide for the time and manner in which the proposed constitutional revision or amendments shall be submitted to a vote of the electorate, but no such revision or amendments shall be effective unless approved at a general election by a majority of all of the votes tallied upon the question, such majority constituting at least thirty-five percent of the total vote cast at such election, or at a special election by a majority of the total vote tallied upon such question, such majority constituting at least

thirty-five percent of the total number of registered voters; provided, that no constitutional amendment altering this proviso or the representation from any senatorial district in the senate shall become effective unless it shall also be approved by a majority of the votes tallied upon the question in each of a majority of the counties.

The provisions of this section shall be self-executing, but the legislature shall make the necessary appropriations and may enact legislation to facilitate their operation.

AMENDMENTS PROPOSED BY LEGISLATURE

Section 3. The legislature may propose amendments to the constitution by adopting the same, in the manner required for legislation, by a two-thirds vote of each house on final reading at any session, after either or both houses shall have given the governor at least ten days' written notice of the final form of the proposed amendment, or, with or without such notice, by a majority vote of each house on final reading at each of two successive sessions.

Upon such adoption, the proposed amendments shall be entered upon the journals, with the ayes and noes, and published once in each of four successive weeks in at least one newspaper of general circulation in each senatorial district wherein such a newspaper is published, within the two months' period immediately preceding the next general election.

At such general election the proposed amendments shall be submitted to the electorate for approval or rejection upon a separate ballot.

The conditions of and requirements for ratification of such proposed amendments shall be the same as provided in Section 2 of this article for ratification at a general election.

VETO

Section 4. No proposal for amendment of the constitution adopted in either manner provided by this article shall be subject to veto by the governor.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No.

KAZUHISA ABE, et al., *Appellants,*

v.

WILLIAM S. RICHARDSON, et al., *Appellees.*

Appeal from the United States District Court for the District of Hawaii

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JURISDICTIONAL STATEMENT

Pursuant to United States Supreme Court Rules 13(2) and 15. the appellants file this their statement of the basis upon which it is contended that the Supreme Court of the United States has and should exercise jurisdiction on a direct appeal to review the decisions and orders of the United States District Court for the District of Hawaii.

OPINIONS BELOW

The opinions of the District Court from which this appeal is taken are as follows: Decision and Order, dated February 17, 1965, entered on April 9, 1965, and reported at 238 F.Supp. 468; Decision and Order, dated and entered on April 28, 1965, and reported at 240

F.Supp. 724. The decisions and orders are appended to this jurisdictional statement as Appendices A and C, respectively (pp. 1a to 22a and 27a to 43a, *infra*).

An order dated and entered on March 9, 1965, which is unreported, is appended as Appendix B (pp. 23a to 26a, *infra*).

JURISDICTION

The appeal herein is from the decisions and orders issued and entered by the United States District Court for the District of Hawaii specially constituted under 28 U.S.C. §§ 2281 and 2284 upon the plaintiffs' complaint. The plaintiffs brought suit under 42 U.S.C. §§ 1983, 1988, 28 U.S.C. § 1343, and 28 U.S.C. §§ 2201, 2202, for a declaration of invalidity and for preliminary and permanent injunction to enjoin the enforcement, execution and operation of the State of Hawaii Constitutional provisions relating to the apportionment of the Senate and the House of Representatives of the Hawaii Legislature on the ground that these Hawaii Constitutional provisions were repugnant to the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. (R. 2-33)[1]

The District Court's first order, dated February 17, 1965, was entered on April 9, 1965 (Appendix A). Upon motion of intervening-defendants, the District Court issued an order, dated and entered on March 9, 1965, suspending temporarily its order of February 17, 1965 (Appendix B). The District Court then issued its order dated and entered on April 28, 1965, which

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[1] References to the record certified by the Clerk of the District Court (other than the reporter's transcripts of hearing and evidentiary proceedings) are designated "R."

reinstated the provisions of the order of February 17, 1965 (Appendix C).

Notice of appeal was filed by these appellants in the United States District Court for the District of Hawaii on May 7, 1965. (R. 641-50) Separate notices of appeal were filed by John A. Burns, Governor of Hawaii on May 3, 1965 and by Elmer F. Cravalho, et al., on May 7, 1965. (R. 612, 651)

The Supreme Court of the United States has jurisdiction to review by direct appeal the decisions and orders of the District Court under the provisions of 28 U.S.C. §§ 1253 and 2101(b).

The following decisions sustain the jurisdiction of the Supreme Court to review the orders on direct appeal in this case: *Reynolds* v. *Sims*, 377 U.S. 533 (1964); *WMCA* v. *Lomenzo*, 377 U.S. 633 (1964); *Davis* v. *Mann*, 377 U.S. 678 (1964); *Roman* v. *Sincock*, 377 U.S. 695 (1964); *Lucas* v. *Colorado General Assembly*, 377 U.S. 713 (1964).

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

The constitutional provisions and statute involved in this case are:

1. Amendment XIV, Section 1, Constitution of the United States.

2. Article III, Sections 1, 2, 3, 4 and 5, Constitution of the State of Hawaii.

3. Article XVI, Section 1, Constitution of the State of Hawaii.

4. Article XV, Sections 1, 2, 3 and 4, Constitution of the State of Hawaii.

5. H.B. 987, Regular Session 1965, Third Legislature, State of Hawaii.[2]

The texts of the above constitutional and statutory provisions are set forth in Appendix D (pp. 44a to 60a, *infra*).

QUESTIONS PRESENTED

1. Did the District Court, in seeking to compel reapportionment, abuse its discretion through the employment of excessive and drastic measures, to-wit: prohibiting the Hawaii Legislature from enacting legislation essential to the normal operations of Hawaii State and municipal governments and essential for the continuation of programs necessary for the health and welfare of the people of Hawaii until such time as reapportionment legislation had been passed to the satisfaction of the District Court?

2. Does the Senate reapportionment plan (H.B. 987) submitted by the Hawaii Legislature to the District Court on April 14, 1965, pursuant to the order of the District Court, violate the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States?

3. Does the Fourteenth Amendment to the Constitution of the United States require that at least one

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[2] H.B. 987, in its amended form (S.D. 1, C.D. 1), the provisional reapportionment plan for the Senate of the Hawaii Legislature which was the subject of scrutiny by the District Court, was passed by both houses of the Hawaii Legislature and submitted to the Governor of Hawaii for approval. The Governor neither approved nor vetoed the bill within the period provided in the Hawaii Constitution. By reason thereof, on July 26, 1965, the bill became law without the Governor's signature. As such, it is now an act (yet unnumbered) of the Session Laws of Hawaii 1965 (as yet unpublished).

of the two houses of the Hawaii Legislature be apportioned on the basis of single-member districts unless valid and compelling reasons are shown for the creation of multi-member districts?

4. Does the Fourteenth Amendment to the Constitution of the United States require the creation of legislative districts which are substantially homogeneous in racial, political, occupational, industrial, and socio-economic complexion, with each such grouping having potentially equal representation?

5. Within the constitutional limitations imposed by "equal weight" and "equal population" principles, does the Fourteenth Amendment permit the exercise of political judgment in the fashioning, structuring, balancing and employment of other factors in the development of fair and effective representation for all voters in the State Legislature?

6. Did the District Court abuse its discretion in attempting judicially to structure and employ the various factors, other than population base, which enter into consideration in the development of fair and effective representation for all voters in the Hawaii Legislature?

7. Was the District Court justified in finding that the Senate reapportionment plan (H.B. 987), submitted by the Hawaii Legislature to the District Court on April 14, 1965, was the result of gerrymandering and thus arbitrary and capricious and violative of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, simply because two or more incumbent Senators within some proposed multi-member districts happened to reside within short distances of each other?

8. Where the Hawaii Legislature has reapportioned the Senate among senatorial districts containing substantially equal population per senator, does the Legislature have the burden of showing that the Senate reapportionment plan does not operate to minimize or cancel out the voting strength of political, social, economic or racial elements of the voting population and that it is otherwise constitutionally justifiable, or do the opponents of the plan have the burden of demonstrating that the plan is invidious or otherwise constitutionally invalid?

9. Does the fact that the geographical boundaries of certain senatorial districts of the Hawaii Legislature are identical to or coincide to a great degree with the geographical boundaries of certain representative districts cause the votes of Hawaii citizens to be unequal in weight or otherwise violate the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States?

10. Does the legislature of the State of Hawaii have the power to enact at least temporary and provisional reapportionment legislation relating to the Hawaii Senate, pending the adoption of amendments to the Hawaii Constitution providing for the reapportionment of the Hawaii Senate which meet the requirements of the United States Constitution?

11. Did the District Court abuse its discretion in requiring that a permanent reapportionment plan for the Senate, at least, of the Hawaii Legislature be in effect by the November 1966 general elections, and by requiring that the State constitutional amendments necessary to bring about such permanent plan must be proposed by a constitutional convention rather than by the Legislature?

STATEMENT OF THE CASE

On August 13, 1964, plaintiffs, who are citizens, taxpayers and qualified voters of the City and County of Honolulu, State of Hawaii, on their behalf and on behalf of others similarly situated, filed a complaint against William S. Richardson, Lieutenant Governor, State of Hawaii. The Lieutenant Governor of Hawaii is responsible for supervising all State elections. The complaint sought a declaratory order that those portions of the Hawaii Constitution relating to the apportionment of the Hawaii Legislature denied the plaintiffs due process of law and the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States. (R. 2-33)

The complaint alleged that the sections of the Hawaii Constitution relating to the apportionment of the Legislature were invalid in that neither the Senate nor the House of Representatives was apportioned on the basis of population and that there was an unfair overrepresentation in the Legislature of less populated areas of the State.

The complaint prayed for a declaration that the State Legislature has the power to provide provisional apportionment by statute pending the adoption of an appropriate constitutional amendment. It also prayed for an injunction enjoining the Lieutenant Governor of Hawaii from conducting any election or performing any duties relating to or affecting the nomination and election of State legislators in the 1964 and 1966 elections unless and until the Legislature had been reapportioned to the satisfaction of the District Court.

Together with the complaint, the plaintiffs filed a motion for a preliminary injunction to enjoin the

Lieutenant Governor from performing his duties relating to the nomination and election of State legislators in the 1964 elections under the existing Hawaii Constitutional provisions.

On August 24, 1964, a district court of three judges was convened pursuant to 28 U.S.C. §§ 2281 and 2284. The Governor of the State of Hawaii was permitted to intervene as intervenor-plaintiff. A State representative was permitted to intervene as intervenor-plaintiff, and other State representatives were permitted to intervene as intervenors-defendants. Certain State Senators intervened as intervenors-plaintiffs and other State Senators intervened as intervenors-defendants. (R. 669) The appellants herein are some of the State Senators who intervened either as intervenors-plaintiffs or intervenors-defendants.

After a hearing, the District Court on August 26, 1964, orally denied plaintiffs' prayer for a preliminary injunction and permitted the 1964 election to be held under the existing provisions of the State Constitution. (R. 669)

A hearing on the merits of the plaintiffs' complaint was held on January 11, 12, and 13, 1965. After the hearing, by its decision and order, dated February 17, 1965 (entered on April 9, 1965), the District Court held that the plaintiffs and intervening-plaintiffs failed to prove that the apportionment of the House of Representatives of the Hawaii Legislature, based on registered voters, was in violation of the Fourteenth Amendment to the Constitution of the United States, but that the Hawaii Constitutional provisions relating to the apportionment of the Senate violated the Equal Protection Clause of the Fourteenth Amendment.

(Appendix A, p. 20a, *infra.*) The District Court held that the Hawaii Legislature could not, by statute, effect reapportionment and that "any change in the representation from any senatorial district must be by constitutional amendment." (Appendix A, p. 18a, *infra.*)

By paragraph 4 of the order, the District Court enjoined the Hawaii Legislature from taking final action upon any legislation, except such actions as were necessary to organize the respective houses at the 1965 regular session and to appropriate funds for the session, until the Legislature had enacted legislation providing for a special election to be held not later than August 1, 1965, on the question of whether or not a constitutional convention should be convened for the purpose of proposing amendments to the Hawaii Constitution, including, at least, amendments reapportioning the Senate of the Hawaii Legislature. (Appendix A, pp. 20a to 21a, *infra.*) The District Court retained jurisdiction for all purposes, including the judicial reapportionment of the Senate in the event the electorate rejected the calling of a constitutional convention, or the convention failed to propose or the electorate failed to adopt appropriate amendments reapportioning the Senate before the 1966 elections.

Upon motion of intervening-defendants (including the appellants herein), on March 9, 1965, the District Court amended paragraph 4 of its order of February 17, 1965, to permit the Hawaii Legislature to enact a provisional reapportionment plan and to propose an appropriate constitutional amendment by statute rather than by constitutional convention. (Appendix B, pp. 24a to 25a, *infra.*) As amended, the order enjoined the Legislature from taking final action on any legis-

lation until the Legislature had (1) enacted a provisional reapportionment and redistricting plan for the Senate based on the number of registered voters in the 1964 general election to be applicable for the 1966 elections; (2) adopted a proposed constitutional amendment, embodying pertinent provisions of the provisional plan, to be submitted to the electorate for ratification at the 1966 general election; and (3) enacted legislation to submit to the electorate at the 1966 general election the question whether or not a constitutional convention should be convened to propose amendments to the Hawaii Constitution. These measures were to be enacted by the Legislature within 20 days following the date of the order and were subject to the approval of the District Court. If the measures were not approved by the court, the original injunction was to be automatically reinstated.

On March 18, 1965, the Legislature advised the District Court that a provisional plan, approved in substance by both houses, was in conference committee and ready to be submitted to the District Court. The plan retained the existing six senatorial districts, but changed the number of senators to be allocated to each district based on the method of equal proportions. The plan apportioned two senators to the first senatorial district (East Hawaii); one senator to the second senatorial district (West Hawaii); two senators to the third senatorial district (Maui); nine senators to the fourth senatorial district (Southern Oahu); ten senators to the fifth senatorial district (rest of Oahu); and one senator to the sixth senatorial district (Kauai). (Appendix C, pp. 29a to 30a, *infra.*)

The District Court immediately informally advised the Legislature that the plan would not be acceptable

because the apportionment of the Senators was grossly lopsided in that forty per cent of the entire Senate would come from one senatorial district and thirty-six per cent from another adjacent senatorial district. The plan was thereafter forthwith withdrawn from conference committee. The District Court then informally advised the Legislature through a memorandum released to the Legislature that since the House of Representatives was composed of multi-member districts, the Senate should be redistricted into single-member senatorial districts, although the court might approve two-member districts only if the Legislature could affirmatively show substantial reasons therefor. (Appendix E, p. 61a, *infra.*)

On April 14, 1965, the Legislature, pursuant to the order of March 9, 1965, passed and sent to the District Court the following three bills:[3] (1) H.B. 987, providing for provisional reapportionment of the Senate; (Appendix D, pp. 56a to 60a, *infra.*) (b) H.B. 773, a proposed constitutional amendment embodying the provisional plan; and (c) H.B. 986, a statute calling for the submission to the electorate at the 1966 general election of the question whether or not a constitutional convention should be convened.

H.B. 987, the provisional plan, divided the State into eight senatorial districts, with Senators apportioned as follows:

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[3] H.B. 987 was the subject of the District Court's scrutiny. In the light of its decision on H.B. 987, the District Court did not find it necessary to pass on the validity of H.B. 773 and H.B. 986. (Appendix C, p. 42a, *infra.*) See footnote [2] on the present status of H.B. 987.

County	Senatorial District	No. of Senators	1964 Registered Voters
Hawaii	First	3	28,130
Maui	Second	2	18,786
Honolulu	Third	3	27,073
Honolulu	Fourth	4	35,780
Honolulu	Fifth	4	39,361
Honolulu	Sixth	4	40,629
Honolulu	Seventh	4	37,336
Kauai	Eighth	1	12,266

A hearing on the three reapportionment bills was held on April 15, 16 and 17, 1965. On April 19, 1965, the District Court stayed its injunction against enactment of legislation, pending its ruling on the bills submitted. (R. 580-81)

On April 28, 1965, the District Court issued its decision and order disapproving the provisional plan for the reapportionment of the Senate and reinstating its injunctive restraint against the legislators. (Appendix C, p. 42a, *infra.*)

On May 3, 1965, the Governor of the State of Hawaii filed his notice of appeal to this Court. (R. 612-19) On May 7, 1965, certain intervenor-defendant representatives and these appellants filed their respective notices of appeal to this Court. (R. 641-61)

On May 7, 1965, the Governor of Hawaii filed in the District Court a motion to suspend the injunction against the legislators and to stay the order of April 28, 1965, pending determination of his appeal to this Court. (R. 620-38) The District Court denied the motion on May 11, 1965. (R. 666-67) On May 13, 1965, the Governor of Hawaii applied to Mr. Justice Douglas for a stay of the injunction against legislation. By

order dated May 21, 1965, Mr. Justice Douglas granted the stay. The stay expires if this Court dismisses the appeal or reverses or affirms the judgment below. The expiration of the stay would reinstate the District Court's injunction enjoining the Legislature from enacting any legislation until legislation calling for a constitutional convention is enacted.

On June 22, 1965, upon motion of these appellants, the District Court extended the time within which to docket the appeal and to file this jurisdictional statement to July 31, 1965.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The District Court sought to implement the decisions of this Court set forth in *Reynolds* v. *Sims*, 377 U.S. 533, and its companion cases, in the reapportionment of the Hawaii State Legislature. In that process, the decisions and orders of the District Court raised a number of vital and substantial issues. The issues are of concern to the people of Hawaii and to those who are charged with the responsibility of fashioning proposals for the reapportionment of the Hawaii Legislature which comport with the requirements of the Fourteenth Amendment to the Constitution of the United States.

I. THE DISTRICT COURT ABUSED ITS DISCRETION IN ENJOINING THE LEGISLATURE FROM ENACTING LEGISLATION UNTIL A REAPPORTIONMENT LEGISLATION SATISFACTORY TO THE COURT HAD BEEN ENACTED.

The District Court, by its order of April 28, 1965, rejected the Senate reapportionment plan which had

been submitted to it by the Hawaii Legislature, and reinstated the injunction contained in its order dated February 17, 1965. The injunction enjoined the Hawaii Third State Legislature from enacting any legislation, except such as were necessary to organize the respective houses at the 1965 regular session and to appropriate funds for the session, until the Legislature enacted appropriate legislation for the submission to the voters of Hawaii the question whether or not a constitutional convention should be convened. (Appendix A, pp. 20a to 21a, *infra.*)

While patently, the injunction appears to be aimed at legislative action during the 1965 regular session, which session is now adjourned, the injunction is directed to the individual State Senators and Representatives who are parties to this case and who are all members of the Hawaii Third State Legislature. Under the provisions of the Hawaii Constitution, the life of the Third State Legislature does not expire until at least the next general election (November, 1966) and the Third State Legislature is required to convene again in regular session in February, 1966. In addition, the Hawaii Constitution authorizes the Governor of the State to convene the Legislature, or the Senate alone, in special session at any time. Thus, the injunction is conceivably applicable to the actions of the Third State Legislature at its future legislative sessions.

The District Court's injunction is unnecessarily harsh in its terms and constitutes an abuse of judicial discretion. The record does not justify the imposition of such drastic measure. The injunction prevents the State Legislature from considering legislations necessary for, and of vital importance to, the health and

welfare of the people of Hawaii and the orderly functioning of both State and County governments.

It appears that the District Court was moved to impose such drastic action on the belief or desire that a permanent reapportionment plan for the Senate of the Hawaii Legislature be formulated in time for the 1966 general election to protect the constitutional rights of plaintiffs. Nothing in the record indicates the necessity for the formulation of a permanent reapportionment plan at such rate of speed in order to protect the rights of plaintiffs.

II. THE DISTRICT COURT ABUSED ITS DISCRETION IN JUDICIALLY ATTEMPTING TO STRUCTURE THE VARIOUS FACTORS INVOLVED IN THE DEVELOPMENT OF FAIR AND EFFECTIVE REPRESENTATION FOR EACH VOTER IN THE HAWAII LEGISLATURE.

The Senate reapportionment plan presented to the District Court on April 14, 1965, created eight senatorial districts with substantially equal population per senator. The District Court conceded that "the number of registered voters per senatorial district and apportioned to the four basic areas . . . conforms to the standards required under the method of equal proportions prescribed by the Constitution of the State of Hawaii and thus meets that one test of constitutionality." (Appendix C, p. 31a, *infra.*) The District Court, nevertheless, held the reapportionment plan unconstitutional. It held that the following features made the plan unacceptable: (1) the plan contained multi-member districts; (2) the respective senatorial districts were "highly" heterogeneous in their ethnic, socio-economic, industrial and occupational com-

plexion; (3) the boundaries of some senatorial districts were identical to or coincided to a great degree with the boundaries of certain representative districts.

As indicated by this Court,

> "[T]he achieving of fair and effective representation for all citizens is concededly the basic aim of legislative apportionment." *Reynolds* v. *Sims,* 377 U.S. 533, at 565-566.

One of the factors involved in achieving this aim is the weight to be given to the vote of a citizen in the election of legislators who sit as representatives of the people. In the *Reynolds* case, this Court held that the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States requires that the weight of the vote of a citizen be substantially equal to the weight of the vote of every other citizen, that each citizen have an equally effective voice in the election of members of the state legislature. To insure this equality, this Court announced the standard which must be followed in the reapportionment of the state legislature. It held that both houses of a bicameral state legislature must be apportioned on a population basis. That is, the districts, in both houses of the legislature, must be "as nearly of equal population as is practicable." *Reynolds* v. *Sims,* 377 U.S. 533, at 577.

It is respectfully submitted, that the weight to be given to the vote of a citizen is but one of the factors and that the equal-population principle is but one of the standards which are relevant, are often considered and require structuring in achieving a fair and effective representation system for all citizens. The shape and use of any one of these factors determine the shape and use of other factors, and the structuring and em-

ployment of the various factors require to a great degree the exercise of political judgment and often depend upon the nature and experience and the political and social policies of the body politic.

This Court recognized that these various other factors may exist and may be considered by a state in its reapportionment plan. Thus, in *Reynolds* v. *Sims*, 377 U.S. 533, this Court stated:

> "Somewhat more flexibility may therefore be constitutionally permissible with respect to state legislative apportionment than in congressional districting. . . . What is marginally permissible in one State may be unsatisfactory in another, depending on the particular circumstances of the case." 377 U.S., at 578.

This Court has often recognized history and geography as factors to be considered in drawing district boundaries. It has recognized, too, that integrity of political subdivisions is a factor and that there may be, on a rational basis, some deviation from the equal-population principle, provided, that "the overriding objective [is] . . . substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State." *Reynolds* v. *Sims*, 377 U.S. 553, at 579.

Whether or not the reapportionment plan for the Hawaii Legislature should be based on multi-member districts or on single-member districts, whether the senatorial districts should be homogeneous or heterogeneous in their ethnic, political, socio-economic, industrial and occupational complexion, and whether the boundaries of some senatorial districts may be iden-

tical to or coincide with the boundaries of certain representative districts are among those factors, the structuring of which requires the exercise of political judgment and which is best left to the determination of the body politic. The District Court sought judicially to structure these factors and to curtail the exercise of political judgment by establishing rigid standards that the senatorial districts must be based on single-member districts, that the senatorial districts must be homogeneous in their ethnic, political, socio-economic, occupational and industrial complexion and each such homogeneous district must have potentially equal representation in the Hawaii Legislature, and that no senatorial district boundaries may be identical to or coincide with the boundaries of any representative district. This attempt on the part of the District Court was an abuse of judicial discretion.

Substantial questions relating to judicial power and the exercise of judicial discretion in the reapportionment of the State Legislature are raised by the District Court's attempt to structure the various factors into rigid standards.

III. THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES DOES NOT REQUIRE THAT ONE HOUSE, AT LEAST, OF A STATE BICAMERAL LEGISLATURE BE APPORTIONED ON THE BASIS OF SINGLE-MEMBER DISTRICTS.

The District Court, in holding that the Senate reapportionment plan must provide for single-member senatorial districts, unless valid and compelling justi-

fications are shown for the creation of multi-member districts, based its decision upon (1) *Butcher* v. *Bloom*, 415 Pa. 438, 203 A.2d 556, and (2) the fact that it had earlier upheld the apportionment of the House of Representatives of the Hawaii Legislature and the House was apportioned on the basis of multi-member districts. (Appendix C, pp. 29a and 30a, *infra;* Appendix E, p. 61a, *infra.*)

A. The Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States does not require that at least one house of a bicameral state legislature be apportioned on the basis of single-member districts. The court in *Butcher* v. *Bloom*, 203 A.2d 556, at 572-573, acknowledged that the creation of multi-member districts would not of itself violate the Federal Constitution merely because the voters of one district may vote for two or more representatives while the voters of another district may vote for a lesser number. The court in the *Butcher* case simply recognized the difficulties which may be encountered in setting up multi-member districts, and cautioned that it might be *more prudent* to approach the matter of reapportionment on the basis of single-member districts.

This Court in *Reynolds* v. *Sims*, 377 U.S. 533, stated:

> "Single-member districts may be the rule in one State, while another State might desire to achieve some flexibility by creating multimember or floterial districts." 377 U.S., at 579.

In *Lucas* v. *Forty-Fourth General Assembly of Colorado*, 377 U.S. 713, at 731-732, this Court discussed some of the practical problems in that system of electing a number of senators and representatives on an

at-large basis in a district. This Court, however, made it clear in footnote 21, 377 U.S. 731, that the Court was not intimating that at-large election scheme of a number of legislators from a county or any political subdivision, was constitutionally defective.

Then, in *Fortson* v. *Dorsey,* 379 U.S. 433, this Court stated:

> "Only last Term, in our opinion in Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506, decided after the decision below, we rejected the notion that equal protection necessarily requires the formation of single-member districts." 379 U.S., at 436.

B. Whether or not a state should create multi-member districts or single-member districts in any reapportionment plan, rests in the judgment of the body politic. So long as the equal-population principle is adhered to, as it was in the Hawaii Senate reapportionment plan submitted to the District Court on April 19, 1965, there is room for the exercise of this judgment by the body politic.

The District Court noted in its decision and order of April 28, 1965, that the Legislature, in creating multi-member senatorial districts under the Senate reapportionment plan, failed to consider or use any other criteria, "save number of registered voters, geographical boundaries and historical representative district lines." (Appendix C, p. 32a, *infra.*) Contrary to this finding, the committee reports attached to the plan submitted to the District Court reveal that the Legislature chose multi-member senatorial districts for the following, among other, reasons: (1) single-member districts would tend to produce senators concerned only with localized issues and thus fragment the ap-

proach to state-wide problems and programs to the detriment of the State; (2) multi-member districts would increase the significance of an individual's vote by focusing his attention to state-wide problems; and (3) single-member districts would suffer from the vicissitudes of population shifts such as that found on the island of Oahu in recent years. (Appendix C, pp. 31a to 32a, *infra.*)

It is respectfully submitted that these reasons, cited by the Legislature, are relevant and were properly considered by the Legislature in the reapportionment of the Senate. They were considerations prompted by legislative determination of public policies. The choice between multi-member districts and single-member districts is influenced, consciously or unconsciously, by these, among other, factors and policy questions: (1) In the light of the development of present-day Hawaii and the preoccupation by the Hawaii Legislature with state-wide problems, is it in the public interest to foster the election of legislators who are more attuned to state-wide rather than localized issues and problems? (2) Is the development of strong political party system desirable, and does the multi-member district or the single-member district foster such development? (3) In the light of the size of the legislative body, will single-member districts be composed of far too small a number of voters for an *effective* as well as *equal* representation in the Hawaii Legislature?

C. By its order of February 17, 1965, the District Court found that the apportionment of the House of Representatives of the Hawaii Legislature, with single-member and multi-member districts, was substantially in accord with the equal-population prin-

ciple and therefore constitutionally valid. If the House of Representatives can be constitutionally apportioned, even with multi-member districts, there is no reason why the apportionment of the Senate cannot likewise be constitutionally valid, even if the senators are from multi-member districts, provided the apportionment is on the equal-population principle.

Whether or not one or both houses of the bicameral Hawaii Legislature must be apportioned on the basis of single-member districts is a substantial and important issue in the reapportionment of the Hawaii Legislature.

IV. THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES DOES NOT REQUIRE THE FORMATION OF HOMOGENEOUS DISTRICTS BASED ON ETHNIC, POLITICAL, SOCIO-ECONOMIC, INDUSTRIAL AND OCCUPATIONAL COMPLEXION IN THE APPORTIONMENT OF THE STATE LEGISLATURE, NOR DOES IT REQUIRE THAT EACH OF THESE DIVERGENT FACTORS HAVE POTENTIALLY EQUAL REPRESENTATION IN THE STATE LEGISLATURE.

A. Hawaii, by its nature, is multi-racial. It has the aged and the youths among its voter population. It counts among its population those in the professional class as well as those in the lower socio-economic class, such as laborers, operatives and clerical workers. It has its share of the widows and the retired. To require judicially that each of these divergent factors be grouped into homogeneous districts and that each such divergent factor be given potentially equal represen-

tation in the State Legislature is to deny to the political community the right to shape these divergent factors in accordance with the community's policies formulated in the light of its political, social and economic development and needs.

Whether the divergent factors should be grouped to form homogeneous or heterogeneous legislative districts presents a question which requires the deliberate and serious consideration, better accomplished by the body politic, of many revelant issues. One of these issues is the relative need in the Hawaii community for legislators who represent various groups and thus tend to take the middle-of-the-road positions or for legislators who represent special interest groups and thus tend to take strong, positive stands. The placement of voters of the same economic or ethnic class within a legislative district may or may not be in the public interest. It is a question, in the end, which the body politic must decide.

It appears from the Senate reapportionment plan submitted by the Hawaii Legislature, that it was the considered determination of the Legislature that it was not desirable or that there was no compelling public necessity for voters of the same race or the same social, economic, industrial, occupational or other interest to be grouped homogeneously together within legislative districts.

B. The Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States focuses its attention upon the protection of *individuals.* It is not designed for the protection of any special interest groups or classes of people. Of course, several individuals may fall within the same interest group

or class, and the voting strength of an individual must not be minimized or canceled out simply because he belongs to a particular group or class, *Fortson* v. *Dorsey,* 379 U.S. 433. However, the Equal Protection Clause nevertheless protects a person, not a group or class.

In the apportionment of a state legislature, the Fourteenth Amendment requires that *each man's* vote be given weight equal to the weight of the vote of every other man. While it may be politically or socially desirable or even perhaps necessary that a class or group be represented in the legislature, the Fourteenth Amendment neither requires it nor does it protect it. The state legislature represents people, not groups or classes.

This Court in *Reynolds* v. *Sims,* 377 U.S. 533, commented:

> "Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests." 377 U.S., at 562.
>
> "But neither history alone, nor economic or other sorts of group interests, are permissible factors in attempting to justify disparities from population-based representation. Citizens, not history or economic interests, cast votes." 377 U.S., at 579-580.

A state legislative reapportionment plan, which creates districts substantially on the equal-population principle, is not invalid simply because the districts are composed of various divergent factors, unless it is shown (as it was not, in this case) that, notwithstanding the adherence to the equal-population principle, the weight of the vote of a voter or the weight of the votes of voters of a racial or other group is minimized or canceled out. *Fortson* v. *Dorsey,* 379 U.S. 433.

V. THE FACT THAT SOME SENATORIAL DISTRICTS AND SOME REPRESENTATIVE DISTRICTS HAVE THE SAME OR NEARLY IDENTICAL GEOGRAPHICAL BOUNDARIES WHILE OTHER SENATORIAL DISTRICTS AND REPRESENTATIVE DISTRICTS DO NOT, DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

The Senate reapportionment plan submitted to the District Court by the Hawaii Legislature made the boundaries of the proposed third senatorial district the same as the boundaries of the eighth representative district, and the boundaries of the proposed sixth senatorial district nearly identical to the boundaries of the fifteenth representative district. The District Court held such delineation of senatorial district boundary lines unacceptable. (Appendix C, pp. 37a to 38a, *infra*.) The District Court held that such delineation of boundary lines created "monolithic" political units with the political weight of the voters in such unit, measured in the light of the total number of senators and representatives to be elected by the voters within the unit, far exceeding the political weight of any voter in any other geographic area. (Appendix C, p. 39a, *infra*.)

The Hawaii Legislature created senatorial districts on the equal-population principle. The House of Representatives was earlier held by the District Court to be apportioned on the equal-population principle. Every voter is within one of the senatorial districts and one of the representative districts. Whether the boundaries of the senatorial district and the boundaries of the representative district in which he is situated are identical or substantially different, the weight

of his vote is no more and no less than the weight of the vote of voters in any other senatorial and representative districts. The Fourteenth Amendment does not require a substantial difference within a geographically defined political area or unit in the composition of the body of voters whose combined votes elect a senator from the body of voters whose combined votes elect a representative to insure equality in the weight of the votes.

So long as there is substantial equality in the weight of the votes and so long as the legislative districts are based on the equal-population principle, the legislature is at liberty to determine district lines based on the standards of compactness and contiguity and along geographic and historial lines as was done in this case.

VI. THE DISTRICT COURT ERRED IN PLACING THE BURDEN UPON THE LEGISLATORS TO SHOW THAT THEIR SENATE REAPPORTIONMENT PLAN WAS CONSTITUTIONALLY VALID AND JUSTIFIABLE.

The District Court by its decision and order, dated February 17, 1965, and again by the Memorandum of Judge Beeks to Judge Pence, placed an affirmative burden upon the Legislature to justify any creation of multi-member senatorial districts. (Appendix A, p. 19a, *infra;* Appendix E, p. 61a, *infra.* The tenor of the District Court's decision and order dated April 28, 1965, is that the Legislature had the burden of showing that its senate reapportionment plan did not operate to minimize or cancel out the voting strength of any political, racial, social or economic element of the voting population, and that the plan was otherwise constitutionally valid and justifiable.

The District Court further found, without affirmative proof of any kind being submitted by any party, that the multi-member senatorial district plan resulted, in a material part at least, from gerrymandering. This finding of the court was prompted simply by the fact that a few of the proposed multi-member districts happened to find two or more incumbent senators residing within short distances of each other. (Appendix C, p. 41a, *infra* and footnotes 3 and 4, pp. 34a and 35a, *infra*.) From the finding of the court, it appears that the burden was upon the Legislature to show affirmatively that the multi-member district senatorial reapportionment plan did not result from gerrymandering.

Where a state legislature or other body politic frames a reapportionment plan with districts based substantially on the equal-population principle, the burden is not on the framers to justify the plan, but the burden is upon the opponents of the plan to show that the plan minimizes or cancels out the voting strength of racial or political elements of the voting population, that the plan is the result of gerrymandering, or that it is otherwise constitutionally defective and invalid.

In *Fortson* v. *Dorsey*, 379 U.S. 433, this Court refused to pass on the question whether or not Georgia's reapportionment plan for the Senate of the State Legislature operated to minimize or cancel out the voting strength of racial or political elements of the voting population, although the appellees raised this objection in their briefs, because the point was never seriously pressed by the appellees in the court below and no proof to support the objection was offered at the district court level.

In the same vein, the charge of gerrymandering, if any, and the charge that the Senate reapportionment plan operated to minimize or cancel out the voting strength of a political, racial, social or economic element of the voting population should have been pressed and proof offered in support thereof by the opponents of the Hawaii Senate reapportionment plan.

Questions concerning the proper scope of judicial scrutiny and trial practice and procedure in State legislative reapportionment cases are raised by the decision of the District Court.

VII. THE HAWAII LEGISLATURE HAS THE POWER TO ENACT AT LEAST A PROVISIONAL REAPPORTIONMENT PLAN FOR THE SENATE, PENDING ADOPTION OF A VALID CONSTITUTIONAL AMENDMENT, AND TO PROPOSE SUCH CONSTITUTIONAL AMENDMENT BY STATUTE.

The District Court in its order of February 17, 1965, held that the reapportionment of the Senate of the Hawaii Legislature must be by constitutional amendment. (Appendix A, p. 18a, *infra.*) While the District Court, by its order dated March 9, 1965, lifted temporarily its injunction contained in its order of February 17, 1965, to permit the Hawaii Legislature to enact appropriate reapportionment and redistricting plan for the Senate to be applicable in the 1966 elections, upon rejection of the plan submitted to the court on April 14, 1965, the District Court reinstated its initial injunction.

A. The injunction makes no provision for the enactment by the Hawaii Legislature of any reapportionment plan for the Senate. It is respectfully submitted that the District Court erred in precluding the formu-

lation by the Hawaii Legislature of at least a provisional Senate reapportionment plan, pending the adoption of a valid amendment to the Constitution of the State of Hawaii.

The District Court having declared those provisions of the Hawaii Constitution relating to the apportionment of the Senate of the Hawaii Legislature invalid, those invalid provisions are no longer part of the Hawaii Constitution, and the Hawaii Legislature has inherent power to enact at least provisional reapportionment legislation. *Maryland Committee* v. *Tawes,* 377 U.S. 565. The Constitution of the State of Hawaii in Article III, section 1, grants to the State legislature broad powers extending to "all rightful subjects of legislation not inconsistent with this constitution or the Constitution of the United States." This Court in *Maryland Committee* v. *Tawes*, 377 U.S. 656, 676, and in *Roman* v. *Sincock,* 377 U.S. 695, 702, held that the primary responsibility for legislative reapportionment is in the state legislature.

B. The District Court's injunction further mandates that the Hawaii Constitution be amended by the route of a constitutional convention. The District Court erred in precluding the Hawaii Legislature from formulating necessary constitutional amendment for submission to the electorate or from, at least, exercising a choice between the legislative route and the more expensive route of a constitutional convention in amending Hawaii's Constitution.

Hawaii's Constitution, Article XV, section 1, provides that revisions or amendments to the Hawaii Constitution may be proposed by constitutional convention or by the Legislature. The injunction of the District Court, however, precludes the legislative route.

Again, it is noted, that the District Court apparently was moved to require constitutional amendment by constitutional convention by a certain sense of urgency that a permanent plan for the reapportionment of the Senate had to be formulated and adopted for the 1966 general elections. Nothing in the records and none of this Court's decisions indicate the necessity for such speed in the adoption of a permanent plan.

Equitable considerations favor permitting Hawaii to exercise the option it has of choosing the route it shall take to amend its constitution.

The District Court's injunction, which precludes the enactment by the Hawaii Legislature of a provisional reapportionment plan and the exercise of the option of the legislative route or the constitutional convention route in amending Hawaii's Constitution, raises substantial questions concerning the correctness of the District Court's order and the exercise of discretion by the District Court.

CONCLUSION

This appeal raises a number of serious, substantial and important questions under the Fourteenth Amendment to the Constitution of the United States relating to the reapportionment of the Hawaii Legislature which require plenary consideration by this Court. It is respectfully submitted, therefore, that this Court has jurisdiction of this appeal.

Respectfully submitted,

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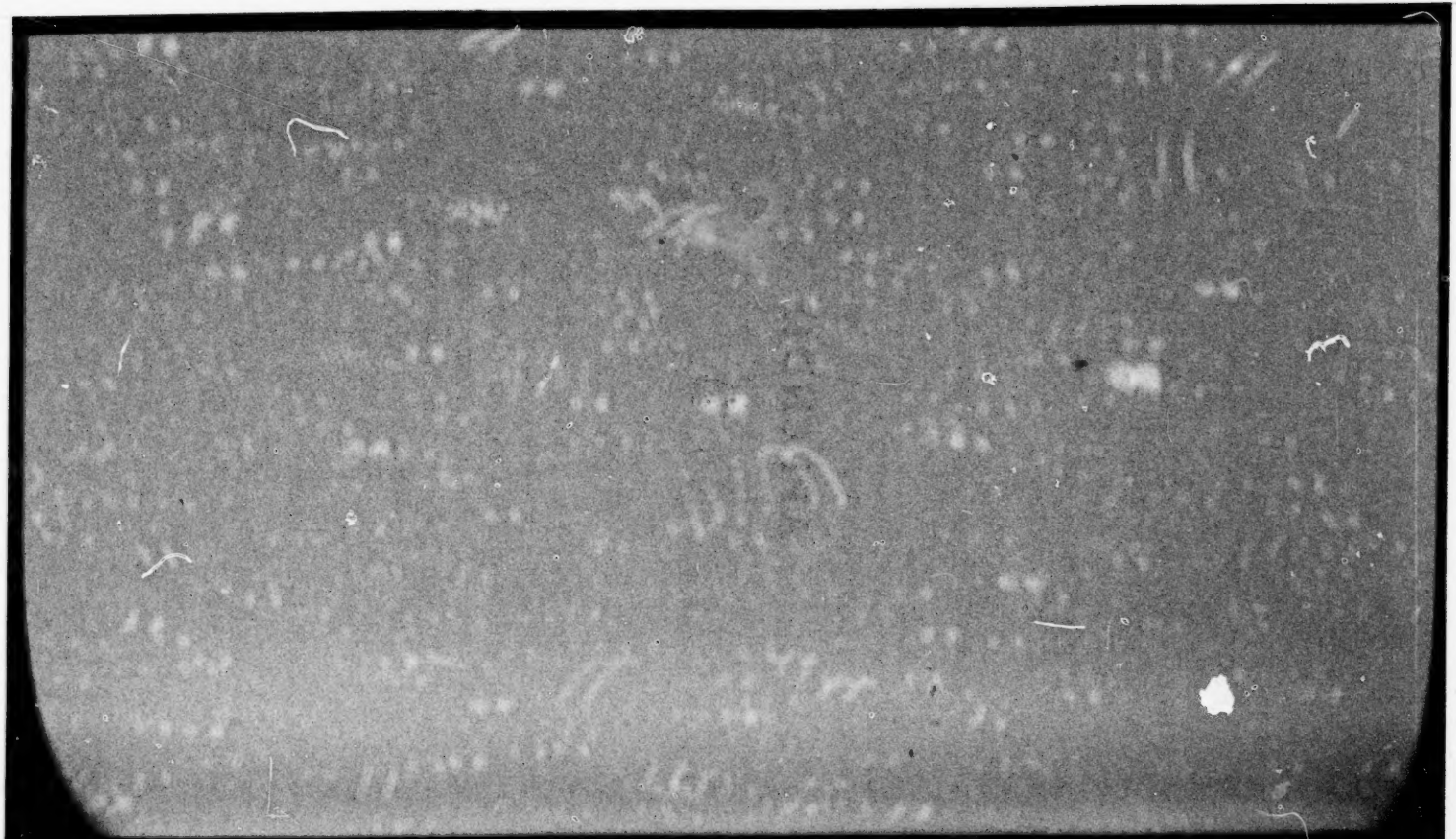
APPENDIX



APPENDIX A

[R. 370]

DECISION AND ORDER

(FEBRUARY 17, 1965)

On August 13, 1964, the plaintiffs, citizens and residents of the State of Hawaii and qualified voters in their respective senatorial and representative districts, on their own behalf and as a class action on behalf of all other citizens, residents and voters in the State of Hawaii similarly situated, filed this complaint against William S. Richardson, Lieutenant Governor of Hawaii (he being responsible for the supervision of elections), seeking to enjoin Richardson from performing any duties relating to the nomination and election of candidates for State legislative offices unless the State legislature enacted a valid reapportionment plan for use in the 1964 elections, praying that this court should in any event make certain that the 1966 election would be conducted under an apportionment plan that would meet the requirements of the Fourteenth Amendment to the Constitution of the United States.

Plaintiffs alleged that the Constitution of the State of Hawaii apportioned the senate on the basis of geography and not population, and the house of representatives on the basis of registered voters and not population, and thus the State's scheme of apportionment was unconstitutional under the Fourteenth Amendment, in the light of *Reynolds* v. *Sims,* 377 U.S. 533 (1964), and its companion cases of the same date: *Maryland Committee* v. *Tawes, Lucas* v. *Colorado General Assembly, Davis* v. *Mann, WMCA* v. *Lomenzo* and *Roman* v. *Sincock.*

The Governor of the State, as well as all state legislators, both senators and representatives, filed their appearance as either intervening plaintiffs or defendants. (After the 1964 elections, all but one of the newly elected legislators likewise filed their appearance.)

A three-judge district court thereafter convened, found that it had jurisdiction under 28 U.S.C. Secs. 2201 and 2281 et seq., as well as under the Civil Rights Act, 42 U.S.C. Secs. 1983, 1988, and the court, after full hearing, on August 26, 1964, because of the imminence of the 1964 elections and the disruptive effects which an injunction would have had thereon, and because the State legislature at that date was convened in special session for the specific purpose of considering the problems of reapportionment, denied the motion for a preliminary injunction and set a hearing on the merits for January 11, 1965. (*Cf. Roman* v. *Sincock, supra.*) The legislature failed to agree on any reapportionment plan, and this decision follows the January hearing.

The Constitution of the State of Hawaii, after being hammered out at a Constitutional Convention composed of nonpartisan delegates elected from all parts of the Territory, was adopted July 22, 1950, to become effective immediately upon the admission of Hawaii into the Union as a state. Hawaii was so admitted on August 21, 1959. The Constitution prescribes a senate of 25 members, obviously and admittedly apportioned basically upon the geographical and political divisions of the State, and 51 representatives apportioned as hereinafter described.

Hawaii is unique in many respects. It is the only state that has been successively an absolute monarchy, a constitutional monarchy, a republic, and then a terri-

tory of the United States before its admission as a state. Because each was insulated from the other by wide channels and high seas (*C.A.B.* v. *Island Airlines*, —— F.Supp. —— (October 8, 1964)) and historically ruled first by chiefs and then royal governors, after annexation the seven major, inhabited islands of the State were divided up into the four counties of Kauai, Maui, Hawaii and the City and County of Honolulu.[1] All this resulted in a strongly centralized form of government.

By 1950, Honolulu, the State capital, had by far the largest population of any county, an essentially urban population, and had become an industrial, manufacturing, military and tourist center. The other three counties remained essentially rural and primarily concerned with agriculture and ranching. With the State having complete control over the judiciary, taxation, education, public health and welfare, etc., it was normal therefore that the three more rural counties of Kauai, Maui and Hawaii would not wish to leave such centralized power, particularly control over the State's purse strings, with urban Honolulu.

Patterning itself after the makeup of the United States Congress, Article III, Section 2 of the State Constitution apportioned the 25-member senate on a basis which enabled the senators of the three counties outside of Honolulu to have numerical control over that body. This was deliberately done in order to preserve the then nationally approved concept of checks and balances between rural and urban populations.

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[1] The artificial and isolated County of Kalawao has always been strictly a Hansen's disease treatment area, operated and controlled by the Board of Health of the Territory and State. It votes with Maui County for State Legislators.

By Article III, Section 4, the house of representatives was apportioned under "the method of equal proportions," i.e., the same method as used in apportioning the members of the House of Representatives of the United States Congress,[2] giving the representatives from the County of Honolulu, with its larger population, potential control of the house. Both single and multi-member representative districts were set up throughout the State.

Under this same Section 4, using the method of equal proportions, the State legislators were apportioned among the four "basic areas," viz., the four counties, on the basis of the number of voters registered at the last preceding general election, and within the counties each representative district had its representation determined by the same method.

Under this same Section 4, the governor was mandated to reapportion the members of the house of representatives on or before June 1 of the year 1959, and at successive 10-year intervals thereafter. On May 1, 1959 (pursuant to Public Law 895, 84th Congress, 2nd Session), the Governor of Hawaii did reapportion the State in the above manner, and such reapportionment transferred increasing control to Honolulu.[3]

All parties before this court conceded (as was also determined by the Supreme Court of Hawaii in *Guntert* v. *Richardson*, 47 Hawaii —— (July 27, 1964)) that Article III, Section 2, relating to the

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[2] Proceedings of the Constitutional Convention of Hawaii, Volume II, (Proceedings), pp. 112-123. See also, *Reynolds* v. *Sims*, *supra*, note 10.

[3] After the Constitutional Convention, Congress put into permanent effect the reapportionment provisions of the proposed State Constitution. (*Davis* v. *Quinn*, 43 Hawaii 261, 269).

composition and apportionment of the State senate is indisputably invalid under *Reynolds* v. *Sims, supra.*

From the inception therefore, it was obvious that Hawaii's Constitution must be amended, at least to provide for a valid apportionment of its senate. In connection with any constitutional reapportionment of the senate, it must be noted that Article XV (Revision and Amendment), Section 2, para. 6, contains the following proviso:

> ". . . . provided, that no constitutional amendment altering this proviso or the representation from any senatorial district in the senate shall become effective unless it shall also be approved by a majority of the votes tallied upon the question in each of a majority of the counties."

As appears in the Proceedings, pp. 761-64, this proviso was specifically inserted in order to freeze representation in the senate, and it gave to the rural counties what amounted to the right of veto over any attempt to change the representative makeup of the senate. This proviso is so closely tied in with the admittedly invalid scheme of senatorial apportionment that it, too, is likewise constitutionally invalid and falls along with Article III, Section 2.

Plaintiffs urge that Article III, Sections 3 and 4, relating to apportionment of the house, are likewise invalid because they are a part of the total scheme of legislative apportionment, inferring that the house would not have been apportioned as it was but for the senate being apportioned as a built-in check in setting up the "checks and balance" scheme of the United States Congress.

This Court finds that this is not necessarily true. Apart from one problem discussed immediately below,

nothing has been called to our attention and we find no evidence—not even in the Proceedings—that the Constitutional Convention would have apportioned the house in any other way than it did.[4]

Plaintiffs urge that in any event, the house of representatives is unconstitutionally apportioned because apportionment thereof is based upon the number of voters registered at the last preceding general election (Art. III, Sec. 4), and not upon a gross, i.e., total population basis.

Article II, Sections 1 and 2, covering suffrage and elections, provides, in substance, that every literate United States Citizen who is compos mentis and not an unpardoned felon, 20 years old or more, residing in the State not less than one year next preceding the election, and a registered voter, shall be qualified to vote. This court finds nothing in Article II which is constitutionally invidious as discriminating against any one on the basis of race, color, creed, employment or geographical location, and as indicated in Article III, Sections 2 and 3, defining who may elect senators and representatives, it appears that the term "qualified voters" is used practically synonymously with registered voters under Article III, Section 4.

This court is not prepared at this time to accept plaintiff's premise that total population is the *only*

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[4] In connection with both the senate and the house of representatives, plaintiffs have claimed that the *number* of legislators in each house, viz., 25 and 51, are part of some invidious scheme. Exhibit 14, Table 14 clearly illustrates that there is no built-in magic or invidiousness in the use of such numbers. The matter of the size of each legislative body and the adoption of a 15-member senate and 31-member house, or a 21-member senate and 41-member house, as well as the ultimately approved 25-member senate and 51-member house were thoroughly explored by the Convention. (Proceedings, pp. 89-101, 112-132)

basis upon which apportionment of state legislatures can constitutionally be based. The Court in *WMCA* v. *Lomenzo, supra,* notes that "New York uses citizen population instead of total population, excluding aliens . . . , for purposes of legislative apportionment" and apparently found nothing invidious in that fact. In *Maryland Committee* v. *Tawes, supra,* The Court said:

> "Rather, the proper, and indeed indispensable, subject for judicial focus in a legislative apportionment controversy is the overall, representation accorded to the *State's voters,* in both houses of a bicameral state legislature." (Emphasis added.)

The Court thus re-expressed what it said in *Gray* v. *Sanders,* 372 U.S. 368, 379:

> "Once the geographical unit for which a representative is to be chosen is designated, *all who participate in the election* are to have an equal vote—whatever their race, . . . their income, and wherever their home may be in the geographical unit." (Emphasis added.)

The Court has said time after time throughout *Reynolds* v. *Sims, supra,* and the companion cases only that "both houses must be apportioned substantially on a population basis." (Emphasis added.)

Plaintiffs urge and have presented figures showing that on the basis of the 1960, 1962 and 1964 population, the house of representatives is malapportioned. To begin with, paraphrasing *Guntert* v. *Richardson, supra,* 1950 and 1958 registered voters, and 1960, 1962 and 1964 population, are not comparable figures. The Court does not demand that legislatures be reapportioned annually. *Reynolds* v. *Sims, supra,* Subject VIII. This court, at this time, can only determine if

the basis of apportionment, when adopted in 1950 and when used for reapportionment in 1959, did in fact at those times result in apportionment "substantially on a population basis."

The Convention tried "to write into this Constitution a proposal that would not deny a single individual in this territory the right to suffrage." (Proceedings, p. 49). The basis of apportionment by population vs. registered voters was thoroughly discussed.

> "The idea among other things was to make the districts as nearly equal population-wise as possible. . . ." (Proceedings, p. 107)
>
> . . . .
>
> "One of the reasons why the reapportionment directed by the Organic Act[5] was not carried out was because that act required reapportionment on the basis of citizen population. A breakdown of the population according to this standard has not been locally available. Total population figures for the territory are shown by census tracts which do not necessarily coincide with locally defined areas. As a practical matter, the number of registered voters was found to bear a reliable and fairly uniform relationship to total population, although it favors slightly the neighbor islands where the percentage of persons who have registered to vote is from one to two per cent higher than for Oahu. It was in recognition of the potential difficulty in obtaining figures which would show citizen population, or figures which would show total population by desirable districts, that the basis for reapportionment of the members of the House was chosen as the number of registered voters." (Proceedings, p. 107)
>
> "The problem as stated in the report and as stated by the committee chairman this morning of using

[5] Organic Act, Secs. 60, 62.

population in these districts is that it is next to impossible to obtain accurate population figures for the districts that we want to use or even for the old precincts or for any districts, unless you should take your representative districts to be the same districts that are used by the Census Bureau. Now it is quite possible that by the next census we could convince the Census Bureau that they should break their areas up into the areas that we may decide upon for representatives.

". . . . [I]n checking this over in the committee we found that there was actually percentage wise or using the method of equal proportions or anything else, very little difference whether we used registered voters, votes cast or population." (Proceedings, p. 124)

The testimony of Robert Schmitt[6] (see Transcript of Proceedings of August 1964 hearings (TR) beginning p. 80) illustrated with certainty that the term "population" as determined by the Census Bureau was far from an accurate or reliable method of determining the true number of *residents* of a given area—at least in Hawaii.

"The 1960 Census definition of population used in its compilation, ... included all armed forces stationed ashore in Hawaii, regardless of their legal or voting

[6] Robert Schmitt: employed by the Department of Planning and Economic Development of the State of Hawaii; a member of the American Statistical Association; member of the Population Association of America and author of some 60 articles in professional journals; Research Development Analyst in charge of the Research Division of the Honolulu Redevelopment Agency for four years; in charge of research for the Seattle City Planning Commission; author and editor of the Statistical Abstracts of Hawaii; census tract key person for Honolulu of the U. S. Bureau of Census for many years; holds a Master's Degree from the University of Cincinnati, with additional graduate work from the University of Hawaii, University of Michigan and the University of Washington. (TR 69-70)

residence. It included all men aboard ships in Hawaii ports on the census date . . . April 1st, 1960; that is [if] a ship tied up in Kapalama Basin or in Pearl Harbor, Ford Island, the entire crew of that ship was assigned to that geographic area.

"This was also true in the case of civilian ships. For example, the Ala Wai Yacht Harbor included a number of house boats and yachts which were enumerated in Hawaii." (TR 80)

". . . If the person on the night preceding the census had been there . . . each hotel or transient accommodation was enumerated. . . .

"[T]hey enumerated every person in Hawaii at that time, but they then reallocated them to their home states. . . ." (TR 81)

". . . We don't know how many were here at that time. *But we made an estimate.* . . . The Census Bureau did *not* report how many such persons were reallocated." (Emphasis added.) (TR 82)

". . . There is no certainty how many were reallocated. We assume that all of them were." (TR 83)

"There were two ships [picked up in the 1960 census], one the Kiwishiwi . . . and the other the Black Hawk. . . . [T]he total personnel of perhaps four hundred . . . were assigned to [an area of Waikiki along the Ala Wai Canal]. . . . [H]ere we had approximately four hundred of the ship's crews . . . classified as military . . . who were assigned to this [Waikiki] enumeration district. . . .

"[I]n 1920 . . . they inadvertently threw 3,000 Pearl Harbor people into the . . . Honolulu judicial district." (TR 106-07)

"In 1960, the number of members of the Armed Forces . . . was either 54,000 or 47,000 . . . [or 42,122 if we subtract the 1960 civilian population of

590,650 from 632,772—See Ex. 14, p. 12], the census count was 47,000, and the Department of Defense counted 54,000." (TR 116)

Since the total civilian population of Hawaii (excluding the military) in 1960 was but 585,505 (Ex. 14, Table 12), it is seen that the military did account for about 10% of the total population. (1960 Census estimate, Ex. 15, Table 9.) Hawaii has become the United States' military bastion for the entire Pacific and the military population in the State fluctuates violently as the Asiatic spots of trouble arise and disappear. If total population were to be the only acceptable criteria upon which legislative representation could be based, in Hawaii, grossly absurd and disastrous results would flow from a blind adherence to "the elusive 'one person-one-vote' aphorism." (Mr. Justice Harlan in *Fortson* v. *Toombs*, —— U.S. ——, (January 18, 1965.)

For example, if Hawaii's reapportionment year had been 1944, when the civilian population was 464,250 and the military population was 407,000, then areas which normally might have a total population entitling them to but a small percentage of the total number of legislators would suddenly find themselves controlling over 90% of the legislature—for the following ten years!

In contrast to the above, in 1950, with a civilian population of 472,780, there were but 21,000 military in Hawaii—less than 5%. In two years, this had jumped to 55,000. In 1958 there were 55,000 military, with a civilian population of 555,222. Two years later, there were 79,000 military in Hawaii. (Ex. 15, Table 11) As the plaintiffs have admitted, if the State were reapportioned at the present time on a straight total population basis, the *Fifth* senatorial district, con-

taining within its bounds most of the military and naval installations of the State, would be entitled to 13 senators—a majority of the Senate!

A theoretical proposed redistricting of the City and County of Honolulu (Ex. 8) based on total population under the *1960* census, with the primary consideration being substantial equality of *total population,* gave Oahu 20 senators out of 25, and 41 representatives out of 51. (TR 189—Schmitt) A result of such proposed redistricting was that the largest representative district in point of population would be the one that included Schofield Barracks "in fact, it is completely Schofield Barracks," (TR 190) i.e., military population. Although it would thus become the largest representative district in the State, "in point of registered voters [it would be] the smallest district on the island." (TR 191) And Schmitt admitted, in testifying concerning Exhibit 17, that it was possible in a single representative district so reapportioned on a total population basis, for such a district to have almost no voters at all.

This court does not have before it the problem presented to the Supreme Court of Hawaii, in *In Re Robertson, Jr.*, 48 Hawaii —— (October 30, 1964), viz., the question of whether a service man's residence on a Federal military reservation precludes him from establishing his residence in Hawaii. If he so desires to become a resident of Hawaii, this court can only state that there is nothing in the State Constitution or the Hawaii statutes which per se excludes members of the armed forces from establishing their residence in Hawaii and thereafter becoming eligible to vote. This court finds no scheme in Hawaii's Constitution or in the statutes implementing the exercise of franchise

which is aimed at disenfranchising the military or any other group of citizens.

Not only does the fluctuating military population of the State make representation on the basis of total population politically suspect, but the large number of tourists[7] who continually flow in and out of the State and who, as above indicated, for census purposes are initially at least, counted as part of Hawaii's census population (10,000 estimated, 1960 census), would likewise result in gross inequity to citizens of the State eligible to vote, if total population were held to be the only constitutional basis for reapportionment in Hawaii.

The difficulties undoubtedly faced by the Constitutional Convention in determining the best method to set up a system giving equality of representation is further illustrated by references contained in Exhibit 14 on statistics based on the year 1960—not the year 1950 when the Constitution was adopted, or 1959 when the house of representatives was reapportioned. Exhibit 14, Table 1 shows that the total *civilian* population as of July 1st, 1960 was 590,650, with 202,059 registered voters or 34.2% registered. Table 3 shows the *total* population as 632,772, thus indicating but 31.9% of the population as having registered. Table 4, however, shows that out of the State population of 312,478 *United States citizens* (thus including the military) of voting age, the 202,059 registered voters accounts for 64.7% of all that class. Table 5 indicates that out of the *total* population age 20 or over (thus

[7] The Hawaii Visitors Bureau statistics show that tourists in Hawaii, for overnight or longer, numbered—in 1950, 46,593; in 1958, 171,588; in 1960, 296,517; in 1962, 362,145; in 1964, 510,000 (preliminary figure).

including non-citizens), of 360,193, 231,914 could qualify as being eligible to register. Thus even in 1960, the registered voters actually accounted for 87.1% of all of the possible *voting population* of the State of Hawaii.

That, in Hawaii, apportionment on a registered voter basis is not invidious per se, is further illustrated by Exhibit 14, Table 13, wherein it appears that 19 senators would be apportioned to Honolulu regardless of whether the basis was registered voters in the 1962 election or civilian population. Likewise, there is shown but a difference of two representatives (38-40) for Honolulu in such projected apportionment of the house, a difference which might result from the application of the method of equal proportions.

Hawaii's centralized education system has resulted in an unusually literate citizenry, and interest in politics and strong drives to bring out the vote have resulted in a vote of from 88 to 93.6% of all registered voters during the elections of 1958, 1959,[8] 1960 and 1962. (Ex. 14, p. 12)

Representation based upon those eligible to vote, rather than registered voters, might conceivably have been a better solution, but neither in 1950 nor in 1958, as Schmitt testified (TR 96-98), was there statistical data available from which the necessary figures could have been gleaned and applied to the representative districts. As he also said, any attempt to determine the number of military personnel or their dependents who are eligible to vote in Hawaii by representative district "would strain the available statistical sources to the breaking point." (TR 98)

[8] First political implementation under Statehood.

This Court does not hold that registered voters as a basis for representation is the perfect basis. Paraphrasing the words of The Court in *Fortson* v. *Dorsey*, —— U.S. ——, this court finds the use of registered voters as a basis of apportionment did not, in Hawaii, in fact "designedly or otherwise . . . operate to minimize or cancel out the voting strength of [any] . . . elements of the voting population." (At p.——) Nor did it in 1959 bring about that result.

As the records of the Constitutional Convention show (Proceedings 103-111), the districting, both for the senate and the house of representatives, followed along historical, political, geographic and physical lines. There was no gerrymandering in the invidious sense. As Dr. Schmitt testified (TR 96), the representative district lines sometimes cross statistical matters reported in the census, because the census divided up the State into census tracts. While for some of the cities of the State block statistics are available, nevertheless it is rather rare when the census tract coincides with the precinct in an election district. "There seems to have been an unfortunate disregard of precinct boundaries and representative district boundaries in laying out the census tracts and vice versa." (TR 96)

Plaintiffs have pointed to the result of the redistricting in Representative Districts Nos. 1 and 2—Puna and South Hilo on the Island of Hawaii—as proof positive that the districting brought about a result condemned in *Reynolds* v. *Sims, supra,* as unconstitutional, in that in 1959, given a man-average per representative of 3437 voters, Puna with a 1958 registered voter population of about 2209 was given one representative and South Hilo with a registered voter pop-

ulation of 13,836 was given but three (i.e., 4459 voters per representative)—ergo an arbitrary and invidious dilution of the votes of the South Hilo voters! While The Court did state:

> "It is inconceivable that a state law to the effect that, in counting votes for legislators, the votes of citizens in one part of the State would be multiplied by two, five, or 10, while the votes of person in another area would be counted only at face value, could be constitutionally sustainable",

this broad conclusion, however, was modified a few lines thereafter by the following:

> "Weighting the votes of citizens differently, by any method or means, *merely* because of where they happen to reside, hardly seems justifiable." *Reynolds* v. *Sims, supra.* (Emphasis added.)

As was also stated by Mr. Justice Black in *Colegrove* v. *Green,* 328 U.S. 549, 569-71:

> "[T]he constitutionally guaranteed right to vote and the right to have one's vote counted clearly imply the policy that state election systems, no matter what their form, should be *designed* to give *approximately* equal weight to each vote cast. . . ." *Reynolds* v. *Sims, supra,* note 40. (Emphasis added.)

The record of the Proceedings (pp. 139, 141, 157) shows that in an endeavor to make all of the representative districts of the State large enough so that the figures would approach the 1950 common denominator of 2445, Puna (1st Representative District), when combined with Keaukaha (now in the 2nd Representative District) came to 2355. The delegates from South Hilo opposed this because geographically Keaukaha was separated from the nearest inhabited portion of Puna by a lava forest over six miles wide, traversed

by but one road. It was an integral part of the City of Hilo, using that city's power, water, police, fire protection, schools and all public services. Its population was almost entirely of Hawaiian extraction; almost all of its inhabitants were employed only in Hilo; and basically, it had no community, ethnic or industrial bond or interest with Puna.

The voting population of Puna, on the other hand, was very predominantly of Japanese extraction, with no urbanization whatsoever, and with almost its entire population employed by one sugar plantation.

Keaukaha had 644 voters. It was recognized that the 1711 voters of Puna ethnically, industrially and socially were a cohesive unit, and such districting, as a matter of practical politics, would have left Keaukaha with *no* real representation.

> "[Keaukaha] was put in Puna in the first place . . . [in] . . . an effort to get a larger number of voters in the district that was going to elect one representative. It should be the natural thing to put it in South Hilo as [the delegates from Hawaii County] propose to do it now and it would not disturb the allocation of voters between Puna and South Hilo, and North Hilo and Hamakua." (Proceedings, p. 157)

As a matter of fact, also, neither in Puna nor in South Hilo did the resultant number of voters per representative, then or in 1959, violate the method of equal proportions. This court finds ample justification for and no invidious vote dilution in the above districting.

As indicated above, this court cannot say that Hawaii's method of districting was part of any invidious scheme to disenfranchise any person or group, or to dilute the vote of any person. In hindsight, this court

could say, as did Dr. Schmitt, that for the purpose of determining eligibility to vote in any precinct or district, it would be far easier to secure some such information if the districting and precinct lines also coincide with the census county divisions and census tracts. (TR 96)

There is nothing which appears in the Proceedings (pp. 173-74) to indicate that the ordering of reapportionment of the house in the year preceding that in which the census is normally taken was part of a scheme to dilute the vote of any person, rather, that year was used because the 5th Legislative Session after the Constitutional Convention would have terminated its work in May 1959. Since reapportionment was based upon registered voters, the census figures did not appear to the delegates to have any application.

Obviously, if the rights of the citizens of Hawaii are to be protected, the Constitution of the State of Hawaii must be amended—and amended before the 1966 general elections. The action of the legislature in failing to provide for reapportionment during its special session called for that purpose only last summer was disappointing to this court—and undoubtedly to the Supreme Court of Hawaii. See *Guntert* v. *Richardson, supra.*

As pointed out by the Supreme Court of Hawaii in *Guntert,* any change in the representation from any senatorial district must be by constitutional amendment. This court concurs!

Under Article XV, Section 3 of the Hawaii Constitution, while the legislature may propose amendments to the Constitution, such amendments can only be voted on at a general election. If the legislature at its special

reapportionment session of 1964 had proposed any reapportionment amendment, it could have been voted on in the 1964 election, but that legislature did not so act. Having determined that the senate at least, must be reapportioned before the 1966 general election, this court, in the inception, is now compelled to attempt to achieve that result by following the constitutional method provided under Article XV, Section 2. In the event that the constitutional route fails or, if followed, produced an invalid scheme of apportionment, only then would this or any other court be justified in attempting to assume the Herculean task of devising and enforcing a temporary reapportionment system.

In the event that a Constitutional Convention is convened, then in view of the questions and problems which have been raised before this court in this case, as well as before the Supreme Court of Hawaii in *Guntert* v. *Richardson, supra*, the delegates, in addition to providing for reapportionment of the senate, may also wish to reconsider the question of:

1. Whether it will continue to use registered voters as the apportionment basis, or change it to State citizen population eligible to vote (i.e., voter population), or citizen population, or total population.

2. Whether it is better to have one or both houses of the legislature composed of single member representative districts, or to have and justify[9] one or both houses composed, in whole or in part, of multi-member or floterial districts.

3. Whether decennial reapportionment of either or both houses should be made on or before June 1st of

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[9] *Butcher* v. *Bloom*, 203 A.2d 556, 572-73.

the year preceding the Federal census—as is now the case—or on a date soon after the taking of such census.

4. Whether the representative district lines should remain substantially as they now are or whether ultimately (i.e., after 1970) there should be redistricting in such a manner that the census tracts and representative districts can be coordinated for the statistical purposes necessary to implement the changes (if any) made in the basis of apportionment.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

1. Those provisions of Article III, Section 2 of the Constitution of the State of Hawaii fixing the number of senators per senatorial district are hereby declared unconstitutional and invalid. The remainder of Article III of said constitution is declared constitutional and valid.

2. The proviso at the end of the sixth paragraph in Section 2 of Article XV pertaining to amendments affecting representation in the Senate is hereby declared unconstitutional and invalid. The remainder of Article XV is declared constitutional and valid.

3. The plaintiffs and intervening plaintiffs have failed to prove that the apportionment of the House of Representatives of the Legislature of the State of Hawaii causes any invidious discrimination in the weight of their vote or that such apportionment is the result of arbitrary or capricious action. Their prayers for relief in this respect are therefore denied.

4. This court will not interfere with the convening or conducting of the business of the Third State Legislature in regular session in 1965, save and except that

the parties herein are hereby enjoined from taking final action upon any legislation, except such actions as are necessary to organize the respective houses at such session and appropriate funds for the session, until legislation, pursuant to the provisions of Article XV of said Constitution providing for the submission to the people of Hawaii, by special election to be held not later than August 1, 1965, the question: "Shall there be a convention to propose a revision of or amendments to the constitution?", and for any and all acts required by law to implement such legislation, has been enacted into law. Such legislation shall also provide that if the vote be in the constitutional affirmative, then a special election shall be held not later than September 15, 1965 to elect delegates to the convention in the manner provided in the Constitution. Such legislation may include legislative action under Article XV, Section 2, 4th paragraph, of the Constitution. Such legislation shall further provide that the convention convene not later than October 15, 1965 and that it conclude its deliberation in time to submit its proposed constitutional amendments to the electorate of Hawaii at a special election to be held not later than January 30, 1966, including (but not limiting the convention thereto) provisions therein for reapportioning the Senate of Hawaii on a constitutionally valid basis. Such legislation shall also appropriate and make available funds for the expenses of such elections and convention.

5. The offices of all senators of the Hawaii State Senate are hereby declared vacant as of the day of the general election of 1966. Until such date, the existing offices of all senators elected under Article III, Section 2 of the Constitution, shall be valid.

6. This court retains jurisdiction of this action for all purposes, including but not limited to (a) considering such sanctions as may be appropriate if the orders of this court are not carried out; (b) judicially reapportioning the Senate in the event that the electors of Hawaii reject a constitutional convention, or the convention fails to propose an amendment reapportioning the Senate, or the electors reject such an amendment, or if any amendment of the convention does not insure the apportionment of the Hawaii State Legislature in accordance with the requirements of the Equal Protection Clause of the 14th Amendment to the Constitution of the United States.

7. All other relief prayed for in the Complaint, Complaint in Intervention, and Cross Complaint is hereby denied.

DATED: Honolulu, Hawaii, this 17th day of February, 1965.

GILBERT H. JERTBERG
Circuit Judge

WILLIAM T. BEEKS
District Judge

MARTIN PENCE
District Judge

APPENDIX B

[R. 454]

FINAL ORDER ON MOTION TO ALTER OR AMEND JUDGMENT
(MARCH 19, 1965)

As stated in this court's Decision and Order of February 17, 1965, a plan reapportioning the Senate of Hawaii must be operative for the 1966 general election, and this court did not in February and does not now wish to assume the task of devising a reapportionment scheme. Faced with the legislature's failure to act during its special reapportionment session of 1964, this court then felt compelled to channel reapportionment measures into the constitutional convention route.

Based upon the current actions of the legislators, followed by the representations by counsel for all parties to this suit that all are in accord with the objectives outlined in the motion to alter or amend judgment, this court is now convinced that the legislative climate has changed and that the legislators presently in session are now prepared to undertake the formulation of a plan for reapportioning the Senate which can be Constitutionally justified. From the representations made, this court is satisfied that the multiple and accelerated special elections and a constitutional convention would cost well over $1,000,000, strain the State's election machinery, and force an as-yet-unsought-for constitutional convention upon the people of Hawaii, with attendant loss of time to the delegates.

This court is therefore prepared to grant the motion of intervenor-defendants Nelson K. Doi et al., and Elmer F. Cravalho et al., to alter the court's Decision and Order of February 17, 1965.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that this court's order of February 17, 1965 be and is hereby altered in the following particulars. Item 4 beginning at the bottom of page 19, and item 6 beginning at the bottom of page 20, are amended to read as follows:

"4. The Senate shall be apportioned on the basis of the number of voters registered at the 1964 general election substantially in the manner outlined by the reapportionment plan for the Senate, set forth in Senate Concurrent Resolution No. 35, adopted by the Legislature of the State of Hawaii on March 1, 1965, and attached to the Motion to Alter or Amend Judgment filed in this court on March 1, 1965. Any such reapportionment plan shall apply to the 1966 elections and thereafter until an appropriate and legal constitutional amendment shall become effective.

"In furtherance of the above, the legislators and parties herein are enjoined from taking final action upon any legislation, except such actions as are necessary to organize the respective houses at such session and appropriate funds for the session, until the State legislature in regular session in 1965:

"(a) shall have enacted a reapportionment and redistricting plan for the Senate on the basis of 1964 registered voters (and applicable to the 1966 elections) and the same shall have become law;

"(b) shall have adopted a proposed constitutional amendment embodying pertinent provisions of the foregoing reapportionment and redistricting plan, to be presented to the electorate for ratification at the 1966 general election, in the manner provided by Article XV, Section 3, of the State Constitution; and

"(c) shall have enacted legislation, pursuant to the provisions of Article XV of the State Constitution, providing for submission to the people of Hawaii at the general election of 1966 the question: 'Shall there be a convention to propose a revision of or amendments to the Constitution?'."

"After (a), (b) and (c) shall have been enacted and adopted, and made operative, the same shall thereupon be submitted to this court for approval.

"If the measures set forth in paragraphs (a), (b) and (c) above shall not have been enacted and adopted by the legislature on or before the twentieth calendar day following the date of the order granting the motion to amend the said Decision and Order, and made operative, and if the same after hearing shall not have been approved by the court, then, as far as then and thereafter applicable, item 4 on pages 19 and 20 and item 6 on pages 20 and 21 of the Decision and Order dated February 17, 1965 shall become automatically reinstated and thereafter remain in full force and effect as if the Motion to Amend the same had not been granted.

* * * * * * * *

"6. This court retains jurisdiction of this action for all purposes, including but not limited to:

"(a) considering such sanctions as may be appropriate if the orders of this court are not carried out; and

"(b) judicially reapportioning and redistricting the Senate, in the event that the obligations of the parties above indicated are not fulfilled, or any reapportionment plan so enacted is not approved by

the court, or the electors of Hawaii at the 1966 general election reject the proposed and court-approved constitutional amendment reapportioning the Senate, or under any other circumstances which this court shall deem appropriate."

In all other respects this court's Decision and Order of February 17, 1965 is reaffirmed.

Dated: Honolulu, Hawaii, this 9th day of March, 1965.

GILBERT H. JERTBERG
Circuit Judge

WILLIAM T. BEEKS
District Judge

MARTIN PENCE
District Judge

APPENDIX C

[R. 582]

DECISION AND ORDER ON HAWAII'S SENATE REAPPORTIONMENT PLAN OF APRIL 14, 1965

(APRIL 28, 1965)

This court has now before it the Hawaii State Legislature's H.B. No. 987, S.D.1, C.D.1; H.B. No. 773, S.D.1, C.D.1; and H.B. No. 986, setting forth that body's response to this court's order of March 9, 1965, viz., presenting (a) a plan for the provisional reapportionment of the Senate on the basis of the voters registered for the 1964 general election; (b) a proposed constitutional amendment encompassing the same plan; and (c) a submission to the electorate in 1966 of the question of calling a constitutional convention.

The road by which the above bills reached this court is tortuous. In August of 1964, when this court first heard this case, the Legislature of Hawaii was then sitting in special session called by the Governor of Hawaii for the specific purpose of attempting to devise a scheme of legislative reapportionment which would be constitutionally valid. The legislature at that session failed to agree on any reapportionment plan. After a hearing in January 1965, this court, on February 17, 1965, found that Article III, Section 2, of the Hawaii State Constitution fixing the number of senators per senatorial district, as well as the proviso at the end of the sixth paragraph in Section 2 of Article XV of the constitution, were invalid, "determined that the Senate *at least* must be reapportioned before the 1966 general election," and enjoined the Third State Legislature in its regular 1965 session from passing any but preliminary "housekeeping" acts until it had set up the machinery for the convening of a constitu-

tional convention to amend the State's legislative scheme of apportionment before the 1966 election. (Emphasis added.)

On March 1st, 1965, the legislature, then convened in regular session, requested this court to alter its order of February 17th so as to permit the legislature itself during that session to pass legislation:

(a) enacting a provisional plan for reapportioning the senate on the basis of the 1964 registered voters, to be effective for the 1966 election and until a constitutional amendment on reapportionment had been adopted by the people of Hawaii as provided in the constitution;

(b) adopting a proposed constitutional amendment embodying pertinent provisions of the foregoing reapportionment plan to be presented to the electorate for ratification at the 1966 general election; and

(c) submitting to the electorate at that 1966 election the question, under Article XV of the State constitution: Shall there be a convention to propose a revision of or amendments to the constitution?

Counsel for all parties to the suit were in accord with the objectives outlined in the motion, and this court was satisfied from the representations made that the constitutional convention route prescribed by its February 17th order would be very expensive and perforce would demand the devotion of great time and effort from the people of Hawaii. The court, then, also believed that the legislators, each and all, would recognize their obligations to the entire electorate of Hawaii, would rise above any possible self-interest, would heed the admonitions of the Attorney General,

and would certainly note the flashing red lights of the caveats set out in this court's order of February 17th, viz., that a constitutional convention *in addition* to providing for reapportionment of the senate might also consider (1) whether the registered voter population should continue to be used as the basis for apportionment, or some other type of population basis should be adopted; (2) "whether it is better to have one or both houses of the legislature composed of single member representative districts, or to have and *justify*[9] one or both houses composed in whole or in part, of multi-member or floterial districts. (Note)[9] *Butcher* v. *Bloom*, 203 A.2d 556, 572-73" (emphasis added); (3) whether there should be a change in the date of decennial reapportionment; and (4) whether there should be redistricting of the representative districts.

This court therefore, by order of March 9, 1965, altered its February 17th order to permit the legislature (a) to enact a provisional reapportionment and redistricting plan for the senate; (b) to adopt "a proposed constitutional amendment embodying *pertinent* provisions of the foregoing reapportionment and redistricting plan" for submission to the electorate at the 1966 general election (emphasis added); (c) to enact legislation to submit to the electorate the question: Shall there be a convention to propose a revision of or amendments to the constitution? This order, like the one of February 17th, demanded that the plan be approved by this court; failing approval, the order of February 17th demanding legislation for implementing a constitutional convention would again become effective.

On March 18th this court was advised that a provisional plan, in substance approved by both houses,

was then in conference committee and about ready to be presented to this court, whereby the senate was reapportioned by dividing the State into the same original six senatorial districts, changing only the number of senators allocated to each district, based upon the use of the method of equal proportion. By that March 18th plan, two senators were apportioned to the first senatorial district—East Hawaii; one to the second—West Hawaii; two to the third—Maui; nine to the fourth—Southern Oahu; ten to the fifth—the remainder of Oahu; and one to the sixth—Kauai.

The legislature quickly thereafter was informally made to understand that such a grossly lumpy apportionment of senators, whereby forty per cent of the entire senate would come from one senatorial district and thirty-six per cent from another alongside, could never be approved, and the plan was forthwith withdrawn from conference committee for reconsideration by the house of representatives. Shortly thereafter, this court flashed an even brighter red light on its caveat number (2) above by informally indicating that because Hawaii had a multi-member district house, any other than single member senatorial districting would have to be justified to this court.

On April 14th, 1965, the legislature passed and sent to this court the numbered bills identified *supra:*

A. H.B. 987, its proposed provisional senatorial reapportionment plan; H.B. 773, its proposed constitutional amendment embodying that same plan; and H.B. 986, submitting to the electorate in the 1966 general election the question of the calling of a constitutional convention. By H.B. 987, the State was divided into eight senatorial districts, viz.:

County	Senatorial District	No. of Senators	1964 Registered Voters per District
Hawaii	First	3	28,130
Maui	Second	2	18,786
Honolulu	Third	3	27,073
"	Fourth	4	35,780
"	Fifth	4	39,361
"	Sixth	4	40,629
"	Seventh	4	37,336
Kauai	Eighth	1	12,266

B. Exhibits A and B, attached to the plan, the same being the reports of the conference committee on the proposed provisional plan (H.B. 987), as well as the proposed plan for the constitutional amendment (H.B. 773) embodying the same, setting forth the conference committee's "justification" for wholly abandoning any attempt to redistrict the senate on a single member district basis.

Senate exhibits Nos. 5 and 6 (maps also filed), outlined the geographical boundaries of the respective senatorial districts of Honolulu.

The court would agree that the number of registered voters per senatorial district and apportioned to the four basic areas, viz., three to the County of Hawaii, two to the County of Maui, nineteen to the City and County of Honolulu, and one to the County of Kauai, conforms to the standards required under the method of equal proportions prescribed by the Constitution of the State of Hawaii and thus meets that one test of constitutionality. *Roman* v. *Sincock,* 377 U.S. 695 (1964); *Reynolds* v. *Sims,* 377 U.S. 533 (1964).

In the attached committee reports, the reasons given, i.e., "justification," for choosing multi-member districts

of three and four senators per district were substantially: (1) single-member districts would tend to cause the senators therefrom to be concerned with localized issues and ignore the broader issues facing the State, and therefore it might fragment the approach to state-wide problems and programs to the detriment of the State; (2) historically the members of the house had represented smaller constituencies than members of the senate, and tradition and experience had proved that balance desirable; (3) multi-member districts would increase the significance of an individual's vote by focusing his attention on the broad spectrum of major community problems as opposed to those of more limited and local concern; (4) to set up single-member districts would compound the more technical and more intricate problem of drawing the boundaries; (5) population shifts would more drastically affect the boundaries of many smaller single-member districts—to a greater degree than would be found in larger multi-member districts, citing Oahu's population boom and subdivision development.

In drawing the district lines the legislature reported that it "relied very heavily" on the standards of compactness and contiguity—"geographical separation and long-established representative precinct lines."

Except for the slightly misleading conclusion that the third senatorial district was *primarily* a suburban area, and that the fourth senatorial district was composed of substantially plantation and suburban communities, from the report it appears that no other criteria, save number of registered voters, geographical boundaries and historical representative district lines were considered or used in forming the plan. Apparently, ethnic, political, industrial, economic, social,

occupational factors, and community of interests and problems were given little if any consideration by the legislature.

The testimony of Senator Sakai Takahashi, chairman of the conference committee, at the April 15, 1965 hearing on the plan, summed up the legislature's underlying raison d'etre with his statement: "We thought it fair."

Mr. Robert Schmitt, statistician, who had testified at length in the hearing of August 1964, again a witness, testified in favor of applying the law of large numbers, viz., that smaller areas with small numbers fluctuate in much greater proportion than do larger areas with larger numbers, to senatorial districts. He, however, had *not been consulted* on the problem of the multi-member districts vs. single-member, or the problem of district lines.[1]

In analyzing the plan, all Mr. Schmitt could say for the third senatorial district was that it had excellent statistical boundaries.[2] It was logical to deduce from his testimony that the boundary between the fourth and fifth senatorial districts had accidentally resulted in an excellent *line of division,* in that it separated the

[1] In its (unsubmitted) plan of March 18th, *supra,* p. 4, two senators were to be elected from East Hawaii, and one senator from West Hawaii. The total registered voters in 1964 in East Hawaii was 20,770, and in West Hawaii was 7,360. In the present provisional plan, this division of the Island of Hawaii was dropped and three senators were to be elected from the first senatorial district, which would now include the entire island. Of the seven senators presently elected from districts one and two, five live within a short distance of each other in Hilo, in East Hawaii.

[2] The location of the residences of two of Honolulu's present total of ten senators is in this district.

military area, i.e., military housing, etc., from the city proper. The best that he could say, however, for the line between the fifth and sixth senatorial districts was that it neatly separated the central business district from residential areas alongside. The line between the sixth and seventh senatorial districts was historical.

Mr. Schmitt, in contradistinction to the conference committee, found it necessary to analyze the representative districts and criticized many of them as being far too small, e.g., the first—on Hawaii, the thirteenth—Kalihi, on Oahu; or much too large, e.g., the fifteenth—with its six representatives. Schmitt pointed out that within the fifteenth district, in the Moiliili area, there was a higher proportion of persons of Japanese ancestry than in any census tract of the island, yet Waikiki, primarily concerned with tourist service, was the second highest among census tracts in percentage of Caucasian residents. Also, high-level professional, technical and managerial people tended to live in Waikiki or upper Manoa,[3] whereas operatives, laborers, clerical workers, middle and lower-middle income people lived in the central (Moiliili, etc.) area.

Mr. Schmitt stated that the fifth senatorial district likewise encompassed a highly heterogeneous area containing a multitude of Caucasian widows in the uplands area, and an overabundance of Filipino males in the seaward portion of the district. The twelfth representative district, therein, had a very high proportion of persons of foreign birth or Asiatic ancestry,

[3] The residences of the three senators from the present fourth senatorial district showed that all lived only a very short distance apart in the upper Manoa area of the fifteenth representative district.

of the lower-middle socio-economic group.[4] Schmitt's only other comment regarding the fifth senatorial district was that the boundary between the twelfth and thirteenth representative districts, i.e., within the proposed fifth senatorial district, had a very unfortunate location.

Schmitt also pointed out that within the seventh senatorial district were two clearly defined and geographically, economically and socially divided groups. In Palolo in the sixteenth representative district area were found the lower socio-economic laborers, operatives, and clerical workers, and in the Waialae-Kahala and Aina Haina areas were the highly professional and managerial class. In the latter area the median annual family income in 1959 was almost $16,000, whereas in Palolo it was $3,000.

From the committee reports and the testimony of Senator Takahashi, it is obvious that the legislature gave sparse, if any, consideration of any of the facts or factors pointed out by Mr. Schmitt, in devising its scheme of multi-member senatorial districts for Oahu.

Although we initially determined that the house of representatives was not unconstitutionally apportioned, by that decision we did not say that those representative districts had been perfectly laid out. We agree with Mr. Schmitt that, compared to the make-up of all other representative districts in the State, the fifteenth is too large.

There can be no truly representative government without a system of apportionment which provides

[4] Similarly, three senators from the fifth district likewise lived a short distance from each other in the twelfth representative district.

potentially equal representation to the divergent factors incorporated within the body politic. Our own representative form of government demands checks and balances, devices and procedures to channel the many and diverse interests of the people into the making of a stream of legislation that produces for each person in that state the maximum beneficence possible. Methods of securing this desired objective were pointed out in *Reynolds* v. *Sims, supra,* at 576-77:

> "Different constituencies can be represented in the two houses. One body could be composed of single-member districts while the other could have at least some multimember districts. The length of terms of the legislators in the separate bodies could differ. The numerical size of the two bodies could be made to differ, even significantly, and the geographical size of districts from which legislators are elected could also be made to differ. And apportionment in one house could be arranged so as to balance off minor inequities in the representation of certain areas in the other house. In summary, these and other factors could be, and are presently in many States, utilized to engender differing complexions and collective attitudes in the two bodies of a state legislature, although both are apportioned substantially on a population basis."

In reapportioning and redistricting the senate, both houses overlooked the fact that, to be valid, the makeup of the senate must positively complement the makeup of the house, to provide the vital equality of voter representation. Both houses of the legislature seemingly forgot that the schemes of districting *each* house, when conjoined, must offer compensating advantages to the voters—not only to those voters within each representative district, be it senate or house, but to all voters throughout the State. While there perforce

must be some overlap of representation with the several senate and house districts, that overlap must not be such as to concentrate and intensify the voting power of a single senatorial-representative district to the point that the voters therein have a built-in disproportionate representational advantage over any other voters of the State.

If the achievement of this goal is even to be approached, there should not be any monolithic political units of representation in that all-inclusive system of apportionment. Unless, within any single geographically defined political area or unit, there is a meaningful and substantial difference in the composition of that body of electors therein, whose combined votes elect a senator, from that body whose combined votes elect a member of the house, then the demanded differing complexions and collective attitudes are lost, the necessary cross checking and resulting balance is absent, and the majorities therein are given a disproportional monolithic command, not only within the narrow political unit, but also within the legislative bodies. Such artificially concentrated political power negates any notion of equality of representation for the minorities entrapped therein, as well as for all other electors of the State outside such a monolithic political unit.

> "However complicated or sophisticated an apportionment scheme might be, it cannot, consistent with the Equal Protection Clause, result in a significant undervaluation of the weight of the votes of certain of a State's citizens merely because of where they happen to reside." *WMCA* v. *Lomenzo,* 377 U.S. 633, 653.

The Hawaiian legislature, whether innocently or de-

signedly, has, nevertheless, built just such monoliths into its reapportionment scheme.

In its effort to achieve its objective of multi-member (three and four) senatorial districts in Honolulu, the legislature made the boundaries of the third senatorial district and the eighth representative district one and the same. Thus from *one* political and geographical unit would be elected four representatives and three senators—seven members of the legislature all responsible to and representing exactly the same constituency! Similarly, the sixth senatorial district was fashioned almost entirely from the fifteenth representative district, with the result that from the fifteenth representative unit, i.e., from the dominant three-fourths of the voting population of that senatorial district, would come six representatives and four senators. (31,302 of the senatorial district's total of 40,629 voters reside in the fifteenth representative district.)

While it is a fundamental factor under the decisions of The Court, population is not the sole definitive measure for setting up either representative or senatorial districts. Compactness and contiguity of the territory are admittedly also factors, but community of interests, community of problems, socio-economic status, political and racial factors—each and all must be considered, and not only must the electoral districts be laid out with the totality of those factors having been taken into consideration, but even more, the sum total of all of the districting must result in substantial equality of meaningful representation to each and all of the voters of the State. "(A)ll who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation,

whatever their income and wherever their home may be in that geographical unit." *Gray* v. *Sanders,* 372 U.S. 368, 379. As indicated, not only was there no totality of consideration of the above factors in setting up the senatorial districts on Oahu, but there was even less totality of consideration of the factors of equal representation to all voters on Oahu and the rest of the State.

Here, the realistic political weight of the voters in both the third and sixth senatorial districts would far exceed the political weight of any voter in any other district, not only in Honolulu but in any other county of the State. It is patent to the court that both the house and the senate, in setting up the senatorial plan either failed or refused to recognize the effect that such a plan would have upon the basis for representation of the entire voting population. Both the Hawaiian senate and house ignored the admonition of the Supreme Court:

"(I)n reviewing a state legislative apportionment case this court must of necessity consider the challenged scheme *as a whole* in determining whether the particular State's apportionment plan, in its entirety, meets federal constitutional requisites. It is simply impossible to decide upon the validity of the apportionment of one house of a bicameral legislature in the abstract, without also evaluating the actual scheme of representation employed with respect to the other house. Rather, the proper, and indeed indispensable, subject for judicial focus in a legislative apportionment controversy is the overall representation accorded to the State's voters, in both houses of a bicameral state legislature." *Maryland Committee* v. *Tawes,* 377 U.S. 656, 673. (Emphasis added.)

This court heretofore said that the house was not unconstitutionally apportioned. This court indicated the means by which the senate could be apportioned to give to every voter the equal protection and equal representation that he is entitled to without disturbing the makeup of the house, but because both houses failed to look at the political scene in its totality and instead viewed the reapportionment scheme of the senate as if it were something that could be fashioned without consideration of its tight juxtaposition to the house of representatives, each house of the legislature jointly and separately took such a myopic view of the political problem involved, that they failed to see and anticipate the overall result of arbitrarily joining their independently constructed senatorial plan with the existing representative scheme.[5] As indicated, both houses failed to heed the words of the Supreme Court, as well as any of the red lights this court had flashed. Both houses failed to heed the advice of the Attorney General of the State of Hawaii, and the end result, based as it is upon reasons which fall very, very short of justifying the resultant multi-member districting of both houses, fails to give to each and every voter of the State of Hawaii the fundamental equality of representation to which each is entitled under the Fourteenth Amendment.

Even if the above, alone, were not enough to render the proposed scheme invalid, it is manifest to this court that the legislature's adamant insistence on three and

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[5] As foretold in *Fortson* v. *Dorsey*, 379 U. S. ..... (1965) "it might well be that, designedly or otherwise, a multi-member constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population."

four-member senatorial districting was the conscious or unconscious—though not unnatural—reluctance of the affected senators to carve out single-member districts which thereafter would in all probability result in a political duel-to-the-death with a fellow and neighbor senator. To have cross-cut any of Honolulu's eighth, twelfth or fifteenth representative districts in order to mark out single-member senatorial districts would, with practical certainty, have left two or three present incumbents to compete head on for a single senatorial seat.

Likewise, the shift on Hawaii from the double, 2–1 senator district scheme, tentatively adopted on March 18th, to the single 3-senator district in the instant plan, was an unmistakable application to East Hawaii's incumbent senators of that same factor of political self-preservation implanted into the Honolulu districting scheme.[6]

This court finds that the present multi-member district scheme of senatorial reapportionment resulted, in a material part at least, from gerrymandering.

We find the proposed plan does not meet the test of equality of representation set down by our Supreme Court and is invalid. We therefore do not approve the plan.

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[6] "(I)n the absence of any reasonable justification (historical or otherwise), such districting (creation of single-member and multi-member districts) might be the result of gerrymandering for partisan advantage and, in that event, would be arbitrary and capricious. In the light of the constitutional pitfalls inherent in such a districting scheme, it would be more prudent to approach the matter of apportionment by setting up single-member districts unless valid and compelling reasons exist which require the creation of some multi-member districts." *Butcher* v. *Bloom*, 203 A.2d 556, 573.

Circuitous or expensive as it may be, the ro
out by the Constitution of this State, viz., by
a constitutional convention, must now be fo
Inasmuch as the plan set forth in H.B. 987 ca
and is not approved by this court, IT IS THERE
ORDERED:

(1) The stay order of this court dated A
1965, is rescinded, effective forthwith; and

(2) As indicated in our Final Order of Ma
1965, item 4 on pages 19-20, and item 6 on page
of the Decision and Order of this court dated Fe
17, 1965, be and they are hereby automatical
stated and now remain and shall continue in fu
and effect until further order of this court.

As may be noted, this court has not herein di
H.B. 773. We are advised that it was able to p
senate by but the barest majority, 13 - 12, far s
the two-thirds demanded by the State constitut
the adoption of a proposed constitutional amen
The same also has not yet lain on the desk of t
ernor for the ten days prior to final adoption,
vided by the constitution.[7] Therefore, proce
the same has not yet been submitted to us. *W*
Rockefeller, 376 U.S. 52, 58. Even if it were, ne
less, in view of our decision on the provisiona
H.B. 987, we would not and now do not find it

[7] In order to move the reapportionment problem
greatest celerity, this court, nevertheless, had advised al
that a provisional plan of reapportionment could be s
to this court and a hearing had thereon immediately
same was passed by the legislature and before the ten-da
during which a proposed amendment must lie on the de
Governor before the same can be adopted and passed.
stant hearing therefore was solely upon the matter of
posed provisional plan.

sary to consider the validity of the proposed amendment, H.B. 773, or the question proposed by HB. 986.

This court continues to retain jurisdiction of this action for all purposes.

This decision shall take effect forthwith.

Dated: Honolulu, Hawaii, this 28th day of April, 1965.

GILBERT H. JERTBERG
Circuit Judge

WILLIAM T. BEEKS
District Judge

MARTIN PENCE
District Judge

APPENDIX D

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. Amendment XIV, Section 1, Constitution of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Article III, Sections 1, 2, 3, 4 and 5, Constitution of the State of Hawaii.

ARTICLE III

THE LEGISLATURE

LEGISLATIVE POWER

Section 1. The legislative power of the State shall be vested in a legislature, which shall consist of two houses, a senate and a house of representatives. Such power shall extend to all rightful subjects of legislation not inconsistent with this constitution or the Constitution of the United States.

SENATE; DISTRICTS; COMPOSITION

Section 2. The senate shall be composed of twenty-five members, who shall be elected by the qualified voters of the respective senatorial districts. The districts, and the number of senators to be elected from each, shall be as follows:

First senatorial district: that portion of the island of Hawaii known as Puna, Hilo and Hamakua, five;

Second senatorial district: that portion of the island of Hawaii known as Kau, Kona and Kohala, two;

Third senatorial district: the islands of Maui, Molokai, Lanai and Kahoolawe, five;

Fourth senatorial district: that portion of the island of Oahu lying east and south of Nuuanu Street and Pali Road and the upper ridge of the Koolau Range from the Nuuanu Pali to Makapuu Point and all other islands not specifically enumerated, five;

Fifth senatorial district: that portion of the island of Oahu lying west and north of the fourth senatorial district, five; and

Sixth senatorial district: the islands of Kauai and Niihau, three.

HOUSE OF REPRESENTATIVES; COMPOSITION

Section 3. The house of representatives shall be composed of fifty-one members, who shall be elected by the qualified voters of the respective representative districts. Until the next reapportionment, the representative districts and the number of representatives to be elected from each shall be as set forth in the Schedule.

REAPPORTIONMENT OF HOUSE

Section 4. On or before June 1 of the year 1959, and of each tenth year thereafter, the governor shall reapportion the members of the house of representatives in the following manner: The total number of representatives shall first be reapportioned among four basic areas, namely, (1) the island of Hawaii, (2) the islands of Maui, Molokai, Lanai and Kahoolawe, (3) the island of Oahu and all other islands not specifically enumerated, and (4) the islands of Kauai and Niihau, on the basis of the number of voters registered at the last preceding general election in each of such basic areas and computed by the method known as the method of equal proportions, no basic area to receive less than one member. Upon the determination of the total number of representatives to which each basic area is entitled, such total shall be reapportioned among the one or more representative districts within each basic area on the basis of the number of voters registered at

the last preceding general election within each of such representative districts and computed by the method known as the method of equal proportions, no representative district to receive less than one member. Upon any reapportionment, should the total number of voters registered in any representative district be less than one-half of the quotient obtained by dividing the total number of voters registered in the State by the total number of members to which the house is entitled, then, as part of such reapportionment, the basic area within which such representative district lies shall be redistricted by the governor in such manner that the total number of voters registered in each new representative district therein shall be more than one-half of such quotient.

The governor shall thereupon issue a proclamation showing the results of such reapportionment, and such reapportionment shall be effective for the election of members to such house for the next five succeeding legislatures.

MANDAMUS

Original jurisdiction is hereby vested in the supreme court of the State to be exercised on the application of any registered voter, made within thirty days following the date specified above, to compel, by mandamus or otherwise, the governor to perform the above duty; and made within thirty days following the date of such proclamation, to compel, by mandamus or otherwise, the correction of any error made in such reapportionment.

ELECTION OF MEMBERS; TERM

Section 5. The members of the legislature shall be elected at general elections. The term of office of members of the house of representatives shall be two years beginning with their election and ending on the day of the next general election, and the term of office of members of the senate shall be four years beginning with their election and ending on the day of the second general election after their election.

3. Article XVI, Section 1, Constitution of the State of Hawaii.

ARTICLE XVI

SCHEDULE
REPRESENTATIVE DISTRICTS

DESCRIPTION; NUMBER OF MEMBERS

Section 1. As provided in Section 3 of Article III until the next reapportionment, the representative districts and the number of members to be elected from each shall be as follows:

First representative district: that portion of the island of Hawaii known as Puna, one representative;

Second representative district: that portion of the island of Hawaii known as South Hilo, four representatives;

Third representative district: that portion of the island of Hawaii known as North Hilo and Hamakua, one representative;

Fourth representative district: that portion of the island of Hawaii known as Kau and South Kona and that portion of North Kona, for convenience herein referred to as Keauhou, more particularly described as follows: from a point at the seashore between the lands of Holualoa 1 and 2 and Puapuaa 2 running northeastly along the boundary of Holualoa 1 and 2 to Puu Laalaau; (2) easterly in a straight line to a point called "Naohueleelua" being the common corner of the lands of Puuanahulu, Kaohe and Keauhou 2nd; (3) southeasterly along the common boundary between Hamakua and North Kona districts to the summit of Mauna Loa; (4) westerly along the common boundary between Kau and North Kona districts to the easterly boundary of South Kona district; (5) northerly and westerly along the boundary between North and South Kona districts to the seashore; and (6) northerly along the seashore to the point of beginning, one representative;

Fifth representative district: that portion of the island of Hawaii known as Kohala and that portion of North Kona not included in the fourth representative district, one representative;

Sixth representative district: the islands of Molokai and Lanai, one representative;

Seventh representative district: the islands of Maui and Kahoolawe, five representatives;

Eighth representative district: that portion of the island of Oahu known as Koolaupoko and Koolauloa, two representatives;

Ninth representative district: that portion of the island of Oahu, for convenience herein referred to as Waialua and Wahiawa and a portion of Ewa known as Kunia and Waipio, more particularly described as follows:

Beginning at the seashore on the boundary between the Ahupuaas of Waimea and Pupukea and following along the North boundary of the Ahupuaa of Waimea to Puu Kainapuaa on the Koolau Range at the junction of the Ahupuaas of Laie, Waimea and Kawailoa, thence southeasterly along the top of the Koolau Range, passing over Puu Pauao and Puu Kaaumakua to the head of Kipapa Gulch, thence down along Kipapa Gulch in all its turnings and windings to Waiahole Ditch, thence southwesterly along Waiahole Ditch in all its turnings and windings to Reservoir No. 31 of the Oahu Sugar Company, thence following a direct line to Puu Palikea on the Waianae Mountain Range, thence northwesterly following along the top of Waianae Mountain Range, passing over Puu Kaua, Puu Kanehoa, Puu Hapapa, Puu Kumakalii, Puu Kalena, Puu Kaala to Puu Pueo, thence westerly along the boundary between the Ahupuaas of Kaena and Keawaula to the seashore at Kaena Point, thence easterly along the seashore to the point of beginning, two representatives;

Tenth representative district: that portion of the island of Oahu, for convenience herein referred to as

Ewa, (excluding Kunia and Waipio) and Waianae, more particularly described as follows:

Beginning at the seashore at Kaena Point, on the boundary between the Ahupuaas of Kaena and Keawaula, and following along said boundary to Puu Pueo on the Waianae Mountain Range, thence southeasterly along the top of the Waianae Mountain Range, passing over Puu Kaala, Puu Kalena, Puu Kumakalii, Puu Hapapa, Puu Kanehoa, Puu Kaua to Puu Palikea, thence following a direct line to Reservoir No. 31 of the Oahu Sugar Company, thence northeasterly along the Waiahole Ditch in all its turnings and windings to Kipapa Gulch, thence up along Kipapa Gulch in all its turnings and windings to the top of the Koolau Range, thence southeasterly along the top of the Koolau Range to the boundary between the Ahupuaas of Halawa and Moanalua, thence southwesterly along the boundary between the Ahupuaas of Halawa and Moanalua to the seashore, thence westerly along the seashore to the point of beginning, four representatives;

Eleventh representative district: that portion of the island of Oahu, for convenience herein referred to as Kalihi, more particularly described as follows: from the intersection of Kalihi and Auiki Streets running westerly along Auiki Street to Mokauea Street; (2) southwesterly along Mokauea Street Extension extended to a point on the outer edge of the reef; (3) westerly along the outer edge of the reef to a point on the Moanalua-Halawa boundary; (4) northerly and northeasterly along the Moanalua-Halawa boundary to the top of Koolau Range; (5) southeasterly along the top of Koolau Range to a place called "Puu Lanihuli"; (6) southwesterly along the top of the ridge between the lands of Kalihi, Kapalama and Nuuanu to Kalihi Street; and (7) southwesterly along Kalihi Street to the point of beginning, three representatives;

Twelfth representative district: that portion of the island of Oahu, for convenience herein referred to as upper Nuuanu, more particularly described as follows:

from the intersection of King and Kalihi Streets running northeasterly along Kalihi Street to the ridge between the lands of Kalihi, Kapalama and Nuuanu; (2) northeasterly along the top of said ridge to a point on the Koolau Range called "Puu Lanihuli"; (3) easterly along the top of said Range to Pali Road at the Nuuanu Pali; (4) southwesterly along Pali Road to Nuuanu Avenue and southwesterly along Nuuanu Avenue to School Street; (5) northwesterly along School Street to the center line of the Kapalama Drainage Canal (Waikiki Branch); (6) southwesterly along said Canal to the center line of the main Kapalama Drainage Canal; (7) southwesterly along said Canal to King Street; and (8) northwesterly along King Street to the point of beginning, three representatives;

Thirteenth representative district: that portion of the island of Oahu, for convenience herein referred to as Kapalama, more particularly described as follows: from the junction of the Honolulu Harbor Channel and the reef running westerly along the outer edge of the reef to Mokauea Street Extension extended; (2) northeasterly along Mokauea Street Extension extended to Sand Island Road; (3) northeasterly along Mokauea Street Extension to Auiki Street; (4) easterly along Auiki Street to Kalihi Street; (5) northeasterly along Kalihi Street to King Street; (6) southeasterly along King Street to the center line of the main Kapalama Drainage Canal; (7) northerly along said Canal to the center line of the Kapalama Drainage Canal (Waikiki Branch); (8) northeasterly along said Canal to School Street; (9) southeasterly along School Street to Nuuanu Avenue; (10) southwesterly along Nuuanu Avenue to the sea; and (11) southwesterly along the middle of Honolulu Harbor and Honolulu Harbor Channel to the point of beginning, three representatives;

Fourteenth representative district: that portion of the island of Oahu for convenience herein referred to as Pauoa, more particularly described as follows: from

the junction of the Honolulu Harbor Channel and the outer edge of the reef running northeasterly along the middle of Honolulu Harbor Channel and Honolulu Harbor to the intersection of Queen Street and Nuuanu Avenue; (2) northeasterly along Nuuanu Avenue to Pali Road and northeasterly along Pali Road to the top of the Koolau Range at the Nuuanu Pali; (3) easterly and southerly along the top of the Koolau Range to a point called "Puu Konahuanui"; (4) southwesterly along the top of the ridge between the lands of Nuuanu, Pauoa and Manoa to a mountain peak called "Puu Ohia" or "Tantalus"; (5) southwesterly along the top of the ridge between the lands of Makiki and Kalawahine to the intersection of Nehoa Street and Lewalani Drive; (6) southerly along Lewalani Drive and Piikoi Street to Wilder Avenue; (7) easterly along Wilder Avenue to Punahou Street; (8) southerly along Punahou Street to King Street; (9) westerly along King Street to Kalakaua Avenue; (10) southerly along Kalakaua Avenue to the center line of the Ala Wai Canal; (11) westerly along said Canal and along the line of said Canal extended to the outer edge of the reef; and (12) westerly along the outer edge of the reef to the point of beginning, five representatives;

Fifteenth representative district: that portion of the island of Oahu, for convenience herein referred to as Manoa and Waikiki, more particularly described as follows: from the intersection of Kalakaua Avenue and the center line of the Ala Wai Canal running northerly along Kalakaua Avenue to King Street; (2) easterly along King Street to Punahou Street; (3) northerly along Punahou Street to Wilder Avenue; (4) westerly along Wilder Avenue to Piikoi Street; (5) northerly along Piikoi Street to Lewalani Drive; (6) northerly along Lewalani Drive to Nehoa Street; (7) northeasterly along the top of the ridge between the lands of Makiki and Kalawahine to a mountain peak called "Puu Ohia" or "Tantalus"; (8) northeasterly along the top of the ridge between the lands of Pauoa, Manoa and Nuuanu to a point on the Koolau Range called "Puu

Konahuanui"; (9) southeasterly along the top of s
Range to a place called "Mt. Olympus"; (10) sou
westerly along the top of Waahila Ridge to the top e
of Palolo Valley; (11) southwesterly along the
edge of said Valley to the forest reserve boundary; (
southwesterly along the southeasterly boundary of
Louis Heights Tract, Series 2 (File Plan 464) to
southerly boundary of said Tract 100 feet southe
erly from Alencastre Street; (13) southwesterly pa
lel to and 100 feet from Alencastre Street and St. Lo
Drive to Waialae Avenue; (14) westerly along Wa
lae Avenue to Kapahulu Avenue extended; (15) sou
erly across Waialae Avenue and along Kapahulu A
nue to Kalakaua Avenue; (16) westerly along Ka
hulu Avenue extended to the outer edge of the re
(17) northwesterly along the outer edge of the ree
a point on the line extended of the center line of
Ala Wai Canal; and (18) easterly along said line
the point of beginning, six representatives;

Sixteenth representative district: that portion of
island of Oahu, for convenience herein referred to
Kaimuki and Kapahulu, more particularly descri
as follows: from a point at the seacoast at a pl
called "Black Point" running westerly along the s
coast to Kapahulu Avenue extended to the sea;
easterly across Kalakaua Avenue and easterly a
northerly along Kapahulu Avenue to Waialae Aven
(3) easterly along Waialae Avenue to a point 100 f
easterly of St. Louis Drive; (4) northeasterly acr
Waialae Avenue then parallel to and 100 feet from
Louis Drive and Alencastre Street to the southe
boundary of St. Louis Heights Tract, Series 2 (F
Plan No. 464); (5) northeasterly along the southe
erly boundary of said Tract to the forest reserve bou
ary; (6) northeasterly along the top ridge of Pal
Valley to the top of Waahila Ridge; (7) northeaste
along the top of Waahila Ridge to a point on the K
lau Range called "Mt. Olympus"; (8) easterly al
the top of the Koolau Range to the top of the ridge
tween the lands of Waialae Nui and Palolo; (9) sou

westerly along the top of said ridge to a place called "Kalepeamoa"; (10) southwesterly along Mauumae Ridge to Sierra Drive; (11) southwesterly along Sierra Drive to Waialae Avenue; (12) easterly along Waialae Avenue to 13th Avenue; (13) southwesterly along 13th Avenue and Ocean View Drive to Kilauea Avenue; (14) westerly along Kilauea Avenue to Makapuu Avenue; (15) southwesterly along Makapuu Avenue to Diamond Head Road; and (16) southeasterly along Diamond Head Road to the Military Road and along the Military Road extended to the point of beginning, four representatives;

Seventeenth representative district: that portion of the island of Oahu not included in any other representative district on the island of Oahu together with all other islands not included in any other representative district, three representatives;

Eighteenth representative district: the islands of Kauai and Niihau, four representatives.

Wherever a roadway, or the intersection of one or more roadways, is designated as a boundary in any of the above descriptions, the center line of such roadway or intersection is intended as such boundary.

4. Article XV, Constitution of the State of Hawaii.

ARTICLE XV
REVISION AND AMENDMENT

METHODS OF PROPOSAL

Section 1. Revisions of or amendments to this constitution may be proposed by constitutional convention or by the legislature.

CONSTITUTIONAL CONVENTION

Section 2. The legislature may submit to the electorate at any general or special election the question, "Shall there be a convention to propose a revision of or amendments to the Constitution?" If any ten-year period shall elapse during which the question shall

not have been submitted, the lieutenant governor shall certify the question, to be voted on at the first general election following the expiration of such period.

ELECTION OF DELEGATES

If a majority of the ballots cast upon such question be in the affirmative, delegates to the convention shall be chosen at the next regular election unless the legislature shall provide for the election of delegates at a special election.

Notwithstanding any provision in this constitution to the contrary, other than Section 3 of Article XIV, any qualified voter of the district concerned shall be eligible to membership in the convention.

Unless the legislature shall otherwise provide, there shall be the same number of delegates to such convention, who shall be elected from the same areas, and the convention shall be convened in the same manner, as nearly as practicable, as required for the Hawaii State Constitutional Convention of 1950.

ORGANIZATION; PROCEDURE

The convention shall determine its own organization and rules of procedure. It shall be the sole judge of the elections, returns and qualifications of its members and, by a two-thirds vote, may suspend or remove any member for cause. The governor shall fill any vacancy by appointment of a qualified voter from the district concerned.

RATIFICATION; APPROPRIATIONS

The convention shall provide for the time and manner in which the proposed constitutional revision or amendments shall be submitted to a vote of the electorate, but no such revision or amendments shall be effective unless approved at a general election by a majority of all of the votes tallied upon the question, such majority constituting at least thirty-five percent of the total vote cast at such election, or at a special election by a majority of the total vote tallied upon such question, such majority constituting at least

thirty-five percent of the total number of registered voters; provided, that no constitutional amendment altering this proviso or the representation from any senatorial district in the senate shall become effective unless it shall also be approved by a majority of the votes tallied upon the question in each of a majority of the counties.

The provisions of this section shall be self-executing, but the legislature shall make the necessary appropriations and may enact legislation to facilitate their operation.

AMENDMENTS PROPOSED BY LEGISLATURE

Section 3. The legislature may propose amendments to the constitution by adopting the same, in the manner required for legislation, by a two-thirds vote of each house on final reading at any session, after either or both houses shall have given the governor at least ten days' written notice of the final form of the proposed amendment, or, with or without such notice, by a majority vote of each house on final reading at each of two successive sessions.

Upon such adoption, the proposed amendments shall be entered upon the journals, with the ayes and noes, and published once in each of four successive weeks in at least one newspaper of general circulation in each senatorial district wherein such a newspaper is published, within the two months' period immediately preceding the next general election.

At such general election the proposed amendments shall be submitted to the electorate for approval or rejection upon a separate ballot.

The conditions of and requirements for ratification of such proposed amendments shall be the same as provided in Section 2 of this article for ratification at a general election.

VETO

Section 4. No proposal for amendment of the constitution adopted in either manner provided by this article shall be subject to veto by the governor.

5. H.B. 987, Regular Session 1965, Third Legislature, State of Hawaii.

A BILL FOR AN ACT

PROVIDING FOR THE PROVISIONAL REAPPORTIONMENT OF THE STATE OF HAWAII.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

SECTION 1. *Senate; Districts; Composition.* The Senate shall be composed of twenty-five members, who shall be elected by the qualified voters of the respective senatorial districts. Until the next reapportionment, the senatorial districts, and the number of senators to be elected from each, shall be as follows:

"Senate; Districts; Composition

Section 2. The Senate shall be composed of twenty-five members, who shall be elected by the qualified voters of the respective senatorial districts. Until the next reapportionment, the senatorial districts, and the number of senators to be elected from each, shall be as follows:

First senatorial district: the island of Hawaii, three;

Second senatorial district: the islands of Maui, Molokai, Lanai and Kahoolawe, two;

Third senatorial district: that portion of the island of Oahu consisting of the eighth representative district as described in the Schedule, Article XVI, Section 1, of the Constitution of the State of Hawaii, as amended, three;

Fourth senatorial district: that portion of the island of Oahu consisting of the ninth and tenth representative districts as described in the said Schedule and the first and the eighth precincts of the eleventh representative district as described in the governor's proclamation issued September 11, 1964, for the 1964 general election, four;

Fifth senatorial district: that portion of the island of Oahu consisting of the twelfth and thirteenth representative districts as described in the said Schedule and the second through seventh precincts, inclusive, and the ninth through twelfth precincts, inclusive, of the eleventh representative district, and the first through fifth precincts, inclusive, and the eighth, eleventh, fifteenth and sixteenth precincts of the fourteenth representative district as described in the said proclamation, four;

Sixth senatorial district: that portion of the island of Oahu consisting of the fifteenth representative district as described in the said Schedule and the sixth, seventh, ninth and tenth precincts and the twelfth through fourteenth precincts inclusive, of the fourteenth representative district as described in the said proclamation, four;

Seventh senatorial district: that portion of the island of Oahu consisting of the sixteenth and seventeenth representative districts as described in the said Schedule, four;

Eighth senatorial district: the islands of Kauai and Niihau, one."

SECTION 2. On or before June 1, of the year 1975, and of each tenth year thereafter, the governor shall reapportion the members of the senate in the following manner: The total number of senators shall first be reapportioned among four basic areas, namely, (1) the island of Hawaii, (2) the islands of Maui, Molokai, Lanai and Kahoolawe, (3) the island of Oahu and all other islands not specifically enumerated, and (4) the islands of Kauai and Niihau on the basis of the number of voters registered at the last preceding general election in each of such basic areas and computed by the method known as the method of equal proportions, no basic area to receive less than one member. Upon the determination of the total number of senators to which each basic area is entitled, such total shall be reap-

portioned among the one or more senatorial districts within each basic area on the basis of the number of voters registered at the last preceding general election within each of such senatorial districts and computed by the method known as the method of equal proportions, no senatorial district to receive less than one member. Upon any reapportionment, should the total number of voters registered in any senatorial district be less than one-half of the quotient obtained by dividing the total number of voters registered in the State by the total number of members to which the senate is entitled, then, as part of such reapportionment, the basic area within which such senatorial district lies shall be redistricted by the governor in such manner that the total number of voters registered in each new senatorial district therein shall be more than one-half of such quotient, provided, however, that there shall be at least one senatorial district in each basic area.

Upon completion of the reapportionment of the senate as provided herein, the governor shall issue a proclamation showing the results thereof.

Except as otherwise provided hereinafter, the initial reapportionment shall be effective for the election of members to the senate in 1976 and shall remain in effect for succeeding senatorial elections until the next reapportionment takes effect. Except as otherwise provided hereinafter, any subsequent reapportionment shall be effective for the election of members to the senate in the year next following such reapportionment and shall remain in effect for succeeding senatorial elections until the next reapportionment takes effect.

An incumbent senator whose term of office does not expire until the second general election following the date of the proclamation, including any such senator whose seat has been apportioned to another district by reapportionment, shall be allowed to complete his four-year term; provided that when the seat of such holdover senator has been reapportioned to another

district, the election to fill the new seat in the district to which such seat has been newly apportioned shall not be held until the time of the second election following such proclamation.

Original jurisdiction is hereby vested in the supreme court of the Senate to be exercised on the application of any registered voter, made within thirty days following the date specified above, to compel, by mandamus or otherwise, the governor to perform the above duty; and made within thirty days following the date of such proclamation, to compel, by mandamus or otherwise, the correction of any error made in such reapportionment.

SECTION 3. The terms of all members of the senate elected or appointed prior to the general election of 1966 shall terminate on the date of the general election of 1966.

Members of the senate elected at the general election of 1966 shall be divided into two classes.

Members of the first class shall hold office for a term of four years beginning with their election and ending on the day of the second general election held thereafter.

Members of the second class shall hold office for a term of two years beginning with their election and ending on the day of the next general election held thereafter.

Upon the expiration of the aforesaid terms of office of members of the respective classes, the term of office of their successors shall be four years.

Of the members to which each senatorial district is entitled, one-half shall be members of the second class. If the total number of senators to which a senatorial district is entitled is not an even number, the number of members of the first class in such district shall be the quotient of said total number divided by two, rounded off to the next whole number. The remainder shall be members of the second class. Membership in the first and second classes shall be determined by the

number of votes cast for each senator in such district. The first class shall consist of those senators, in number corresponding with the number of members of the first class to which such district is entitled, who are elected with the highest number of votes from such district. The remaining senators elected shall constitute the second class.

The senator from a senatorial district that is entitled to one senator shall automatically be a member of the first class.

SECTION 4. This Act shall take effect upon approval by the Governor of the State of Hawaii and by the United States District Court for the District of Hawaii and shall remain in effect until superseded by constitutional amendment; provided that the regular election of 1966, shall be the first election held pursuant to the provisions herein.

APPENDIX E

MEMORANDUM TO JUDGE PENCE FROM JUDGE BEEKS

MEMORANDUM

DATE: March 31, 1965

TO: Judge Pence
FROM: Judge Beeks
SUBJECT: *Holt* v. *Richardson*

I discussed your proposed Decision and Order on Senate Reapportionment Plan of March 18, 1965, and your notes accompanying the same, in a telephone conference with Judge Jertberg on March 29th. Judge Jertberg, because of the fact that he was in Los Angeles without a secretary, asked me to convey to you our joint views, which are as follows:

1. Inasmuch as the Senate Reapportionment Plan of March 18, 1965, is not formally before us, we do not think that any decision and order should be filed because such decision and order would be purely advisory in nature.
2. We believe that the Senate should be redistricted into single senatorial districts, although we may approve two-member districts if any only if the legislature can affirmatively show substantial reasons therefor. There may very well be valid reasons for one or two 2-member districts in the neighboring islands but we perceive no justification whatsoever for other than single member districts on the Island of Oahu, particularly the heavily populated areas thereof.

We have no objection whatsoever to your making our views, as above expressed, informally known to all of the parties but we are opposed to the entry of a written decision and order.

I again discussed this matter with Judge Jertberg, who is now back in Fresno, this morning, read him

this memorandum and he signified his approval and concurrence.

It is our suggestion that you discuss the subject matter of this memorandum with counsel for all parties immediately upon receipt of same (I hope you receive it tomorrow) and thereafter arrange a conference call with both of us (Judge Jertberg will be in Fresno) at noon your time on Friday.

cc: Judge Jertberg
Fresno, Calif.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 323

ELMER F. CRAVALHO, et al., *Appellants,*

v.

WILLIAM S. RICHARDSON, et al., *Appellees.*

No. 409

KAZUHISA ABE, et al., *Appellants,*

v.

WILLIAM S. RICHARDSON, et al., *Appellees.*

On Appeals from the United States District Court for the District of Hawaii

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MEMORANDUM FOR APPELLEE JOHN A. BURNS, GOVERNOR OF THE STATE OF HAWAII

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1. These are appeals taken by certain Hawaii State Representatives (the *Cravalho* appeal, No. 323), and by certain Hawaii State Senators (the *Abe* appeal, No. 409), intervening defendants below, in the same case in the District Court for the District of Hawaii that is the subject of the appeal by Governor Burns, in *Burns* v. *Richardson, et al.,* No. 318, O. T. 1965, cur-

rently pending before this Court on appellant Burns' Jurisdictional Statement.

The primary questions raised by the present appellants relate to the rejection by the District Court of the provisional Hawaii Senate reapportionment plan submitted to the District Court in April 1965.[1] This provisional plan, which superimposed a system of multimember Senate districting upon the existing multimember district scheme of representation in the House, was submitted to the District Court on April 14, 1965. On three hearing days thereafter, testimony, including expert testimony, and argument on the provisional plan were submitted to the District Court. On April 28, 1965, the District Court issued an opinion and order extensively discussing the plan and holding it inconsistent with the Equal Protection Clause.

2. We submit that the District Court correctly held that the Senate provisional plan of April 14 was not consistent with the Equal Protection Clause. Whether "designedly or otherwise,"[2] the plan denied fair, effective and equal representation for all citizens.

The provisional plan imposed a system dividing the state into eight senatorial districts. Twenty-five senators were apportioned among these eight districts. Only one of the eight proposed districts was to be a single-member district, and one other a two-member district; the remaining six districts were to have three or four senators each. This plan was properly considered by the District Court against the backdrop of

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[1] For the background of the provisional Senate plan, see our Jurisdictional Statement in No. 318, pp. 9-11.

[2] See *Fortson* v. *Dorsey*, 379 U.S. 433, 439 (1965).

the fact that the Hawaii House of Representatives also was organized on a multimember basis.[3]

The District Court was clearly correct in holding that the provisional Senate plan undervalued the votes of certain minorities, "entrapped" within large multimember districts, and consequently violated the Equal Protection Clause as interpreted in *WMCA, Inc.* v. *Lomenzo*, 377 U.S. 633, 653 (1964). For example, the proposed Seventh Senatorial District, forming a portion of Honolulu County, consisted of the existing Sixteenth and Seventeenth Representative Districts. These two districts embrace two clearly defined groups, each ethnically, geographically and economically divided from the other. In one are found the lower income laborers, operatives and clerical workers, with a 1959 median family income of approximately $3,000, and in the other the upper professional and managerial classes, with a 1959 median family income of close to $16,000. But one of these Representative Districts is substantially more populous than the other, and it is

[3] As we contend in the appeal in No. 318, the District Court made the clear error of affirmatively upholding the present apportionment of the Hawaii House of Representatives, although as a matter of fact the apportionment of the two houses was not severable, and as a matter of law under this Court's decision in *Maryland Committee* v. *Tawes*, 377 U.S. 656, 673 (1964), it was erroneous for it to pass upon the validity of the apportionment of one house of a bicameral legislature without having the apportionment of the other before it. However, given its premise that the apportionment of the House was proper, the District Court's action in considering the provisional Senate reapportionment proposal in connection with the existing apportionment of the House was certainly appropriate. Indeed, as we point out in our Jurisdictional Statement in No. 318, this approach by the District Court underscores the inseverability of the question of the apportionment of the House and of the Senate.

not improbable to conclude that all four senators from the proposed Senatorial District would have been elected from that Representative District. Single-member districting would have given the diverse interests more effective representation and would not have submerged any of them. — Similar situations exist in varying degrees as to the other proposed Senatorial Districts.

Moreover, as the District Court correctly recognized, in a bicameral legislature one house should act as a counterbalance to the other or serve to offset inequities in the other. Instead of achieving this end, the provisional Senate reapportionment plan serves, as the District Court concluded, only to compound the problems caused by the multimember districting system in the House. — Thus, the massive existing Fifteenth Representative District has virtually the same boundaries as the proposed Sixth Senatorial District in the plan rejected by the District Court. The Fifteenth Representative District has six members (12% of the House membership) and under the proposed plan would have had four senators (or 16% of the Senate). In similar fashion, the existing Eighth Representative District, with four House members, under the provisional Senate plan was to constitute the Third Senatorial District, with three senators. The District Court rightly concluded that: "[T]he realistic political weight of the voters in both the third and sixth senatorial districts would far exceed the political weight of any voter in any other district, not only in Honolulu but in any other county of the State." (J.S. No. 323, p. 13a) And the District Court rightly concluded that the plan—although its method of overvaluation was,

perhaps, "complicated or sophisticated" [4]—was invalid under this Court's decisions on this basis as well.

3. Appellants in these appeals also raise a question as to the correctness of the District Court's ruling that reapportionment must be effected by constitutional amendment, thereby foreclosing provisional reapportionment by statute. (Question 8, J.S. No. 323, p. 7; Question 11, J.S. No. 409, p. 6)[5] They also challenge as excessive, and consequently an abuse of discretion, the District Court's prohibition against other legislation until reapportionment had been provided for. (Question 7, J.S. No. 323, p. 7; Question 1, J.S. No. 409, p. 4) As to these points, it appears that the position of appellants in the present appeals may be in substantial part the same as the position taken by Governor Burns in his appeal in No. 318. (See J.S., No. 318, Questions 8 and 9, p. 5; p. 5 n. 2; pp. 28-34)

4. Had the only questions now presented to this Court on appeal from the District Court's orders in the case below been the questions the present appellants seek to raise as to the correctness of the District Court's rejection of the provisional Senate reapportionment plan, it might well be considered that the District Court's decision—based as it was on a full hearing and on the receipt of evidence—was so clearly factually supported by substantial evidence and correct as a matter of law as not to warrant plenary review on appeal by this Court.

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[4] *WMCA, Inc.* v. *Lomenzo*, 377 U.S. 633, 653 (1964).

[5] Appellants in No. 409 also challenge, as does Governor Burns in No. 318, the requirement that there be a permanent, as opposed to an interim, plan in effect by the 1966 general elections. (J.S. No. 409, p. 30)

However, those are not the only matters concerning Hawaii's reapportionment that is currently before the Court. In the Governor's appeal in No. 318, we are urging the Court to consider various aspects of the Hawaii reapportionment situation, including, among other points, the use of "registered voters" rather than "total population" as the basis for reapportionment; the question of multimember districting; and the inseverability of the question of representation in the Hawaii House of Representatives from that in the Hawaii Senate. These issues find their counterparts in the provisional Senate reapportionment plan, struck down by the District Court, which is the subject of the present appeals. For example, the provisional Senate reapportionment plan, among its other vices, uses the basis of "registered voters" rather than "total population";[6] it compounds the inequities, against which our appeal in No. 318 complains, of the multimember districting in use in the House; and it furnishes an object lesson of the inseverability of the questions of representation in the two houses.

Accordingly, Governor Burns does not object, if probable jurisdiction is noted in No. 318, to the notation of probable jurisdiction as to these appeals, so that the Court may consider together the various questions raised as to the orders below.

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[6] We of course reserve the right to defend the District Court's rejection of the provisional plan on this ground—which was not, of course, relied on by the District Court—or on other alternative grounds.

CONCLUSION

If probable jurisdiction is noted in No. 318, we would not object to the notation of probable jurisdiction in the appeals in Nos. 323 and 409, or to the consolidation of the cases for oral argument.

Respectfully submitted,

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August, 1965

FILED
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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 318

JOHN A. BURNS, Governor of the State of Hawaii, *Appellant*,

v.

WILLIAM S. RICHARDSON, ET AL., *Appellees*.

No. 323

ELMER F. CRAVALHO, et al., *Appellants*,

v.

WILLIAM S. RICHARDSON, et al., *Appellees*.

Upon Appeal from the United States District Court for the District of Hawaii

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

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July 1965

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 318

JOHN A. BURNS, Governor of the State of Hawaii,
Appellant,

v.

WILLIAM S. RICHARDSON, ET AL., *Appellees.*

No. 323

ELMER F. CRAVALHO, et al., *Appellants,*

v.

WILLIAM S. RICHARDSON, et al., *Appellees.*

Upon Appeal from the United States District Court for the District of Hawaii

MOTION FOR LEAVE TO FILE A BRIEF AMICUS

To the Honorable, Chief Justice, and Associate Justices of the Supreme Court of the United States:

Harold S. Roberts, Petitioner, respectfully represents:

(1) He is and for 18 years has been a citizen and taxpayer of the State of Hawaii, and resides in Honolulu, Hawaii.

(2) He was a delegate to the Constitutional Convention of 1950, which drafted the Constitution adopted by the people of Hawaii and which is now in effect.

(3) He has been actively interested in the reapportionment problems of Hawaii and was called as a witness before the Committee of the Whole meetings of the Senate and House of the Special Session of the Legislature of Hawaii in 1964 when it was considering the reapportionment problems involved in this litigation.

(He testified before the House of Representatives, pre-session hearings, July 20, 1964; Senate pre-session hearings, July 21, 1964; House of Representatives hearings, July 27, 1964 on House Bills 2, 3 & 4; House of Representatives hearings, August 7, 1964 on House Bills 5 & 6; Senate hearings, July 28, 1964 on Criteria for Reapportioning and the Role of the Constitutional Convention; Senate hearings, July 29, 1964 on S.B. 10 and S.B. 12; Senate hearings, August 5, 1964 on Unicameralism and Bicameralism; and before the Senate Judiciary Committee on May 3, 1965 on S.B. 475, S.B. 745, and H.B. 677, 699, 894 and 936.)

(4) He has written a number of articles on Hawaii's Constitution published in the Christian Science Monitor, the National Municipal Review and State Government. He helped compile the Proceedings of the Hawaii State Constitutional Convention and wrote the Preface. His testimony on Reapportionment was published in the Hearings before Congress in 1959 and the Honolulu Advertiser has recently published a series of 10 articles on Hawaii's Reapportionment problems written by him.

(5) He has been informed and believes and therefore avers that no opposition will be submitted to the jurisdictional statements filed by the appellants herein.

(6) He believes that no brief will be filed in support of the decision appealed from.

(7) There is a substantial question relating to the effect of the Hawaii State Supreme Court decision which has been treated superficially by Appellant in No. 318 (Brief, pp. 31-32) and not even cited by Appellant in No. 323.

(8) Your petitioner believes that the decision of the Hawaii State Supreme Court (Guntert v. Richardson, 394 P. 2d 444 [Haw. 1964]) requires dismissal of the appeal and affirmance of the

decision of the order appealed from. Your petitioner submits that the order below is correct and should be implemented without delay.

(9) He also believes that appeal from the February 17, 1965 order except for point 4, was not timely or properly raised.

Your petitioner requested counsel for Appellants herein to consent to the filing of a brief, counsel for Appellants John A. Burns and counsel for Elmer Cravalho refused consent.

Wherefore, the petitioner prays that he be permitted to file the brief amicus curiae, submitted herewith and this Court make such other orders as it deems appropriate to render a judgment in accordance with the Constitution of the United States and the Constitution of the State of Hawaii.

Respectfully submitted,

HAROLD S. ROBERTS
Petitioner

RICHARD K. SHARPLESS
Counsel

July 1965

FILE COPY

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FILED
AUG 27 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 318

JOHN A. BURNS, Governor of the State of Hawaii,
Appellant,

v.

WILLIAM S. RICHARDSON, *et al.*, *Appellees.*

On Appeal from the United States District Court for the District of Hawaii

OBJECTION OF APPELLANT TO MOTION OF HAROLD S. ROBERTS FOR LEAVE TO FILE AMICUS CURIAE BRIEF

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August, 1965.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 318

JOHN A. BURNS, Governor of the State of Hawaii,
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v.

WILLIAM S. RICHARDSON, *et al.*, *Appellees.*

On Appeal from the United States District Court for the District of Hawaii

---

OBJECTION OF APPELLANT TO MOTION OF HAROLD S. ROBERTS FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Pursuant to Rule 42(3) of the Revised Rules of this Court, Appellant John A. Burns, Governor of the State of Hawaii, hereby files this objection to the Motion of Harold S. Roberts for Leave to File *Amicus Curiae* Brief, filed in this case and in No. 323, *Cravalho et al.* v. *Richardson et al.*

This objection has two bases: (1) that Mr. Roberts demonstrates no interest in this matter of a nature which would justify his participation in it for the first time on appeal, and (2) that the proposed brief annexed to his motion does not indicate that his presence as an *amicus curiae* would contribute to the consideration of the case by the Court.

1. Mr. Roberts made no attempt of any nature to intervene or participate in the proceedings in the District Court. He identifies his interest in this matter as that of a citizen and taxpayer of Hawaii (Motion, p. 1) and that of an expert on Hawaiian reapportionment questions (Motion, pp. 2-3).—This action was brought in the District Court by plaintiffs whose interest was expressly stated to be that of citizens, taxpayers and voters, and had Mr. Roberts thought them inadequate representatives of the class, he could have sought leave to intervene in the District Court, which was most liberal in permitting intervention. Moreover, any expertise which Mr. Roberts has to contribute to the problems of Hawaii's reapportionment would better have been submitted to the District Court by way of expert testimony,[1] where his competency and the subject matter of his testimony would have been subject to examination by the parties and the District Court according to the rules of evidence.

2. An examination of Mr. Robert's proposed *amicus curiae* brief does not indicate that his presentation is likely to make a material substantive contribution to the issues presented.

a. A considerable portion of Mr. Roberts' proposed brief (pp. 2-6) is spent in an effort to demonstrate

[1] Much of the evidence received below was in this form.

that except in certain limited respects the appeals in No. 318 and No. 323 were not timely filed. The only basis on which this claim is made as to No. 318 is that the notice of appeal was filed on May 3, 1965, more than sixty days after the date borne by the first order in question, the District Court's order dated February 17, 1965. See 28 U.S.C. § 2101(b); J.S. p. 1a.

This suggestion is completely without foundation. On March 1, 1965, a Motion to Alter or Amend the Judgment in a most fundamental way was submitted to the District Court.[2] It was certainly "not addressed to 'mere matters of form but raised questions of substance.'" *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 177 (1944). Under familiar principles even the filing of such a motion tolls the time to appeal. *Leishman* v. *Associated Wholesale Electric Co.*, 318 U.S. 203, 205-06 (1943); *United States* v. *Crescent Amusement Co., supra.* The purpose of the motion was to amend the only coercive portion of the February 17 order, paragraph 4—the heart of the decree. (See J. S. p. 9; pp. 19a-20a)

On March 9, 1965, the court granted the motion and provisionally amended its earlier decree. (J. S. 21a-23a) At this point, the proceedings contemplated by the court's modification of its decree—particularly the permanent reapportionment plan which the legislature

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[2] This motion would have been timely either as a Motion for New Trial (the District Court analogy of a Motion for Rehearing) (Fed. R. Civ. P. 59(a)), or as a Motion to Alter or Amend Judgment (Fed. R. Civ. P. 59(e)), even if the order of February 17 had been entered that day. February 27 was a Saturday. See Fed. R. Civ. P. 6(a). Contrast *FTC* v. *Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 208-11 (1952).

was to consider[3]—could well have made moot the objections of the Governor to the February 17 order.[4] It is impossible to infer from the Governor's support of the motion any acquiescence in the District Court's February 17 rulings to which the Governor objected, particularly the court's ruling that the Hawaii House of Representatives was constitutionally apportioned. Certainly the Governor never intended to acquiesce, and never indicated any acquiescence in those rulings. In fact, the Governor's memorandum supporting the Motion to Alter or Amend the Judgment expressly stated that his support was "without prejudice to any . . . rights of appeal." (R. 413)

On April 19, 1965, the District Court stayed the coercive part of its order of February 17, 1965, pending its ruling on the bills submitted to it by the Hawaii Legislature. The bills actually submitted, of course, did not make moot the objections which the Governor had registered to the holdings expressed in the order dated February 17.[5] Most fundamentally, the bills

[3] While the provisional plan contemplated by the court's order of March 9 was not to include reapportionment of the House, the permanent plan contemplated by that order was not so limited. (J. S. p. 22a) The District Court later made it perfectly clear that it intended broader issues than the Senate reapportionment *in se* to be taken up in the consideration of the permanent plan. See Opinion of April 28, 1965, J. S. pp. 25a-26a; 35a-36a.

[4] Moreover, the motion was in accordance with the Governor's position that provisional reapportionment could be accomplished by statute.

[5] The Governor had repeatedly objected, for example, to the constitutional propriety of the apportionment of the House prior to the District Court's order dated February 17. See R. 223; 298; 364. The language quoted by Mr. Roberts (Br. pp. 3-4) in agreement with the District Court's order dated February 17 is, of course, from the briefs of certain legislators who were aligned on the side of the litigation opposing the Governor, and was never adopted by the Governor.

provided for reapportionment of the Senate only, both provisionally and permanently. For these and other reasons, including those which led the District Court to reject them, the Governor opposed the bills before the District Court.[6]

Accordingly, since a timely Motion to Alter and Amend the substance of the District Court's February 17 order was filed, and was granted under circumstances which might have led to the mootness of the Governor's objections to the February 17 order, and since essential parts of the February 17 order, including its coercive provision, paragraph 4, were not reinstated until the District Court's order of April 28, 1965, it is clear that the notice of appeal in this matter filed on May 3, 1965, was timely. *Leishman* v. *Associated Wholesale Electric Co., supra; United States* v. *Crescent Amusement Co., supra; Zimmern* v. *United States,* 298 U.S. 167, 169 (1936). Certainly, in terms not only of the form but of the realities of the situation, the finality of the February 17 order was completely suspended by the District Court until April 28, 1965. — Thus, on grounds of substance, it is plain that the appeal was timely as to all the questions presented. Any contrary conclusion would have required the taking of an appeal during the extensive proceedings in the Dis-

[6] The assertion by Mr. Roberts (Br. p. 11) that "appellant supported the legislation submitted to the District Court pursuant to the March 9th Order" is completely contrary to the record as far as the Governor is concerned. In late March, 1965, the Governor submitted to the court a lengthy memorandum in opposition to certain Senate reapportionment legislation then being proposed by the Legislature. (R. 479-92; 530-32) When legislation which contained similar vices was formally submitted to the court on April 14, 1965, the Governor opposed it in the ensuing proceedings before the District Court. Transcript of Proceedings on April 15, 1965, p. 167; Transcript of Proceedings on April 16, 1965, pp. 5-12.

trict Court subsequent to February 17—which involved the filing of numerous pleadings and the receipt of oral and documentary evidence—rather than upon their conclusion. Such a result would obviously contravene the policy against piecemeal appeals.

The appeal was also timely as to all questions on the ground that the notice of appeal was timely filed as computed from the entry of the February 17 order on April 9. Section 2101 of the Judicial Code, on which the present appeal is founded, measures the time for taking appeals from the "entry" of the judgment;[7] but even apart from this the date of entry would govern in a civil appeal: "A [District Court] judgment is effective only . . . when entered as provided in Rule 79(a) [providing for entry in the Civil Docket]." Fed. R. Civ. P. 58. See *United States* v. *Hark,* 320 U.S. 531, 534 (1944).

b. The only substantive question discussed by Mr. Roberts in his proposed *amicus curiae* brief is whether the Hawaii Legislature has the power to enact by statute a provisional plan of reapportionment. (Br. pp. 8-10) These contentions are anticipated in our Jurisdictional Statement, pp. 28-32. — If Mr. Roberts is seeking to suggest (Br. p. 10) that the Hawaii constitutional provisions are unique in imbedding the legislative apportionment scheme in the state constitution, and in requiring that constitutional amendments proposed by the legislature be approved or ratified by the people, and that accordingly this aspect of the appeal does not provide a recurring question, we must,

---

[7] This is expressly provided in subsection (a) of Section 2101, although not all of the later subsections, such as subsection (b), repeat it.

however, take this occasion to point out that he is in factual error. For the constitutions of Arizona, Arkansas, Nevada, New Jersey and South Carolina each make provision for a constitutionally-fixed system of apportionment in one house;[8] and those of Maryland, New Mexico and Vermont, like Hawaii's, fix the apportionment of both houses.[9] All eight of these states' constitutions also require ratification of constitutional amendments by the people.[10] Indeed, as we pointed out in our Jurisdictional Statement, this Court has already indicated approval of the technique of adopting a provisional reapportionment scheme by statute in Maryland, a State where the relevant constitutional provisions are strikingly similar to Hawaii's. *Maryland Committee* v. *Tawes,* 377 U.S. 656, 675-76 (1964). (J.S. p. 29)

CONCLUSION

The motion does not disclose any special reason for permitting the movant to file an *amicus curiae* brief, particularly in view of his lack of participation in the case in the District Court; and it does not appear from the proposed brief that any substantive contribution can be made by him.

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[8] See Ariz. Const. art. IV, pt. 2, §1(1); Ark. Const. amend. 45, §3; Nev. Const. art. IV, §5; N. J. Const. art. IV, §2, 1; S. C. Const. art. 3, §6.

[9] See Md. Const. art. III, §§2 and 5; N. M. Const. art. IV, §§3b and c; Vt. Const. art. II, §§13 and 18.

[10] See Ariz. Const. art. IV, pt. 1, §1; Ark. Const. amend. 7, §1; Md. Const. art. XIV, §1, and art. XVI, §1; Nev. Const. art. XVI, §1, and art. XIX, §§ 1 and 2; N. J. Const. art. IX, §§ 1, 4, and 6; N. M. Const. art. XIX, §1; S. C. Const. art. 16, §1; Vt. Const. ch. II, §68.

Accordingly, we urge that the motion for leave to file an *amicus curiae* brief be denied.

Respectfully submitted,

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August, 1965.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 323

ELMER F. CRAVALHO, et al., *Appellants*,

v.

WILLIAM S. RICHARDSON, et al., *Appellees*.

Upon Appeal from the United States District Court for the District of Hawaii

OBJECTION OF APPELLANTS TO MOTION OF HAROLD S. ROBERTS FOR LEAVE TO FILE AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 323

ELMER F. CRAVALHO, et al., *Appellants,*

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Upon Appeal from the United States District Court for the District of Hawaii

---

OBJECTION OF APPELLANTS TO MOTION OF HAROLD S. ROBERTS FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Appellants Elmer F. Cravalho, et al., certain Hawaii State Representatives, hereby file this objection to the Motion of Harold S. Roberts for Leave to File *Amicus Curiae* Brief, filed in this case and in No. 318, *Burns* v. *Richardson, et al.* Appellants withhold consent for the following reasons:

1. Petitioner does not have a substantial interest in this case. The Hawaii Legislature has constructed a

reapportionment plan,[1] which is the main subject of the appeal of Elmer F. Cravalho, et al. Petitioner has failed to show that this reapportionment plan would impair the weight of his vote as a citizen of Hawaii or injure his financial position as a taxpayer of Hawaii.

2. The primary questions raised by the appeal of Elmer F. Cravalho, et al., relate to the provisional Hawaii Senate Reapportionment Plan submitted to the district court on April 14, 1965. The rejection of this plan as violative of the Fourteenth Amendment was the principal reason for the issuance of the injunctive order of April 28, 1965. Petitioner has asked that Hawaii evade these questions of substantial and far-reaching impact. (J.S. pp. 14-19)

3. The decision of the Hawaii Supreme Court, *Guntert* v. *Richardson*, 47 Haw. 662, 394 P. 2d 444 (1964) does not require the dismissal of this appeal as petitioner has alleged.

First, only from the standpoint of permanent reapportionment, the Hawaii Supreme Court stated that in the initial stages of Hawaii's effort to achieve valid reapportionment, the machinery to be used must be by amendment to the State Constitution. 47 Haw. at 667-668.

Secondly, from the standpoint of temporary reap-

---

[1] The provisional Hawaii Senate Reapportionment Plan (H.B. 987, S.D. 1, C.D. 1) was passed by both houses of the Hawaii Legislature and submitted to the Governor of Hawaii for approval. The Governor neither approved nor vetoed the bill within the period provided in the Hawaii Constitution. Therefore, on July 26, 1965, the bill became law without the Governor's signature.

portionment, the Hawaii Supreme Court did not decide the question whether or not the legislature had authority to supply a temporary reapportionment plan, especially after the 1964 elections. 47 Haw. at 669-671.

The *Guntert* case was decided before the 1964 elections, at the inception of Hawaii's efforts to achieve valid reapportionment. 47 Haw. at 668. Since that time the Hawaii Legislature has grappled extensively with the issues of reapportionment and has passed a provisional reapportionment plan and an enactment submitting to the electorate in the 1966 general election the question of the calling of a constitutional convention. Appellants Elmer F. Cravalho, et al., firmly believe that the provisional reapportionment plan achieves equal protection for the people of Hawaii, until the voters shall have the opportunity in the 1966 general election to decide whether they want a constitutional convention on reapportionment.

Further, the district court in its altered order of March 9, 1965, recognized the legislature's authority to provide temporary reapportionment. (J.S. pp. 39a-42a) The provisional Hawaii Senate Reapportionment Plan of April 14, 1965, may be approved either as temporary statutory reapportionment or as a judicially adopted temporary reapportionment plan, if such reapportionment gives equal protection to the people of Hawaii.

4. On May 7, 1965, appellants Elmer F. Cravalho, et al., timely filed their notice of appeal in the district court. Petitioner agrees that the appeal from the order of the district court entered April 28, 1965, was timely.

With respect to the district court order dated

February 17, 1965, and entered April 9, 1965, appellants only question the conclusion which denied the legislature's authority to provide a temporary reapportionment plan (J.S. pp. 35a-36a). However, the district court in its altered order of March 9, 1965, allowed the Hawaii Legislature to enact a temporary reapportionment plan to be submitted to the district court for approval. Until the district court in its order of April 28, 1965, rejected the legislature's temporary reapportionment plan as unconstitutional and reinstated its injunction looking toward a constitutional convention, the district court's conclusion precluding the legislature's authority to provide a temporary reapportionment plan lacked the finality which is essential to appealability. *Zimmern* v. *United States*, 298 U.S. 167, 169-170 (1936); *Leishman* v. *Associated Wholesale Electric Co.*, 318 U.S. 203, 205-206 (1943); *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 177 (1944).

For the reasons above, we urge that the motion for leave to file an *amicus curiae* brief be denied.

Respectfully submitted,

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Counsel for Appellants

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FILED
OCT 11 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 318

JOHN A. BURNS, Governor of the State of Hawaii, *Appellant*,

v.

WILLIAM S. RICHARDSON, ET AL., *Appellees*.

No. 323

ELMER F. CRAVALHO, et al., *Appellants*,

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WILLIAM S. RICHARDSON, et al., *Appellees*.

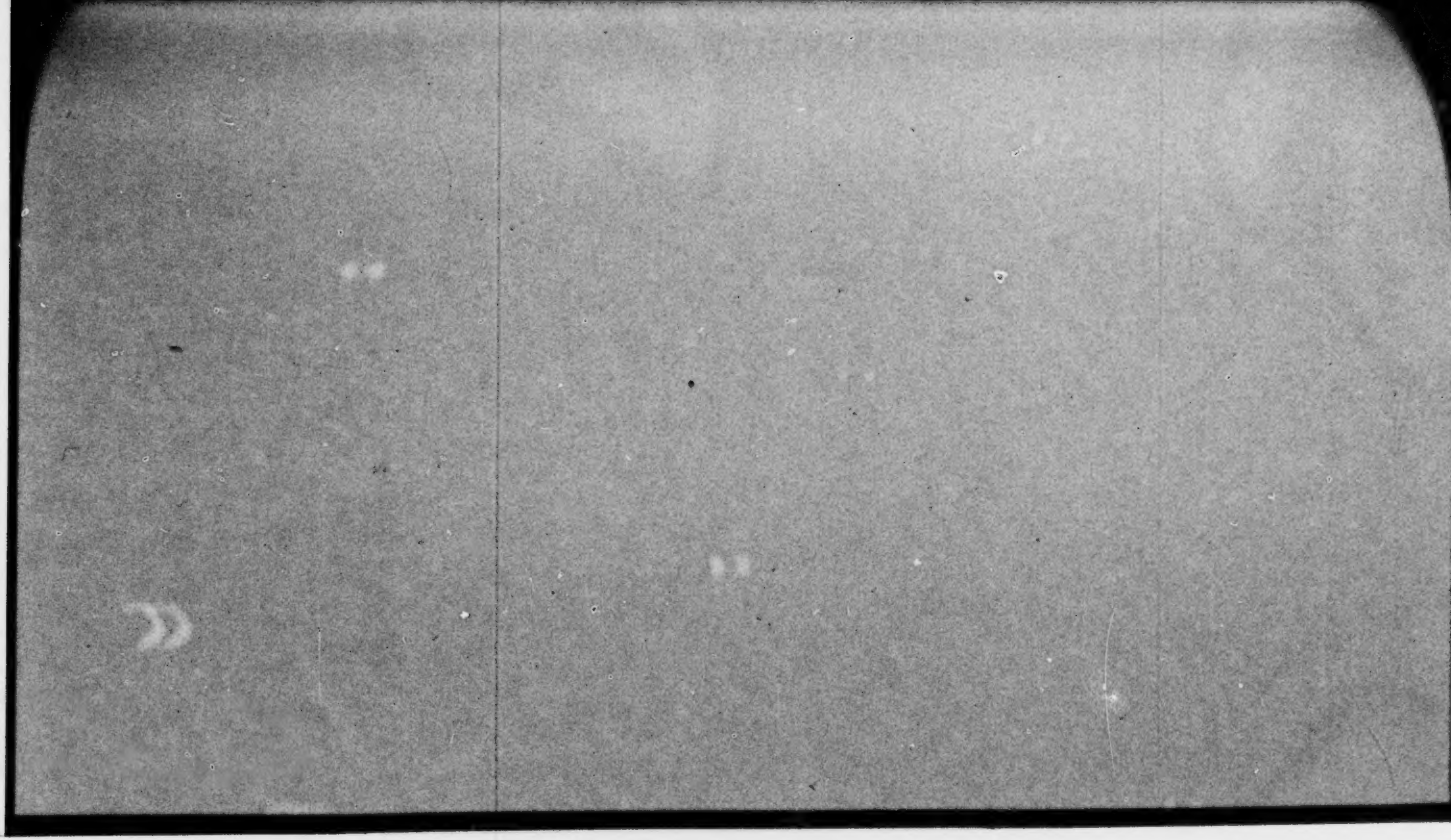
Appeal from the United States District Court for the District of Hawaii

Amicus Curiae Brief in Opposition to
JURISDICTIONAL STATEMENT
~~Amicus Curiae~~

HAROLD S. ROBERTS
Petitioner

RICHARD K. SHARPLESS
Counsel

July 1965



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IN THE

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v.

WILLIAM S. RICHARDSON, et al., *Appellees.*

Appeal from the United States District Court for the District of Hawaii

---

JURISDICTIONAL STATEMENT
Amicus Curiae

Section I. Opening Statement:

Your Petitioner, Harold S. Roberts, Citizen of the State of Hawaii, urges the dismissal of Appellants appeal from the U. S. District Court for the District of Hawaii. The brief amicus is submitted to show that the Appellants have filed a timely appeal only to the April 28 decision of the U. S.

District Court, which relates to procedures for amending the Hawaii State Constitution. The only issue before this Court is the procedure for effecting changes in the Hawaii State Constitution to conform to the June 15, 1964 reapportionment decisions of this Court (Reynolds v. Sims, 377 U. S. 533 [1964], and the companion cases).

It is the belief of your Petitioner that this question is a local question already disposed of by the Hawaii State Supreme Court (Guntert v. Richardson, 394 P. 2d 444 [Haw. 1964]) and affirmed by the District Court (Holt v. Richardson, Civil No. 2308, Feb. 17, 1965, Appellant Burns' Brief Appendix A and Cravalho Brief Appendix A, pp. 17a-39a). In the absence of any substantial Federal question, the order of the District Court should be affirmed.

Section II. Jurisdiction:

Your petitioner is of the opinion that the appeals in Nos. 318 and 323 are not timely filed, except as to item 4 and 6 of the District Court Order and Decree of February 17, 1965 (Jurisdictional Brief No. 318, Appendix A, pp. 19a and 19b). The District Court "Final Order on Motion to Alter or Amend Judgment" of March 9, 1965 makes this abundantly clear (Jurisdictional Brief in No. 318, Appendix B, pp. 21a-32a).

The March 9 Final Order of the District Court resulted from a legislative request in the form of Senate

Concurrent Resolution No. 35 adopted by the Senate and House on March 1, 1965, and not opposed by any of the parties, to permit the Legislature to draft a reapportionment plan for the mal-apportioned Senate for approval by the District Court. No appeal was taken by any of the parties to the March 9, 1965 order.

It appears clear from the Record and the action of the parties to the Suit that they were in agreement that the only remaining problem was the reapportionment of the Senate. The brief submitted jointly to the Court below by Intervenors-Defendants Cravalho and Doi, for the House and Senate, dated March 5, 1965, supports this contention. It states in part:

"It is clear that if the legislature had proposed Constitutional Amendments providing for a constitutionally reapportioned legislature at the special session, the ratification could have been had in the general election of 1964 so that a constitutionally valid reapportioned legislature could be elected in the general elections of 1966. Having missed its 'opportunity' at the special session, the legislature was ordered by this court to amend the Constitution to provide for a constitutionally valid reapportioned senate by the only remaining method provided for in the Constitution--by way of a Constitutional Convention....While intervenors-defendants generally subscribe to

the validity of the theories and policy of the Court in the Decision and Order,...."

They asked the court to permit the legislature to present a plan which the court could submit as its own. This the Court did.

Your petitioner submits that the District Court's acquiescence to the parties (including the Governor) was permissive in nature. When the legislature failed to come up with a plan acceptable to it under sections 4 and 6, the Court in its April 28, 1965 order withdrew the permission it granted on March 9, 1965, and reinstated items 4 and 6 of the February 17, 1965 order.

The District Court order of March 9, 1965, indicates specifically that no controversy existed among the parties, that the only issue to be resolved was the "formulation of a plan for reapportioning the Senate which can be Constitutionally justified." The District Court said in part:

"Based upon the current actions of the legislators, followed by the representations by counsel for all parties to this suit that all are in accord with the objectives outlined in the motion to alter or amend judgment, this court is now convinced that the legislative climate has changed and that the legislators presently in session are now prepared to undertake the formulation of a plan for reapportioning the Senate which can

be Constitutionally justified...."
(Emphasis added)

The same agreement among all the parties is to be found when the legislature submitted its proposed plan for reapportioning the Senate. Neither of the Appellants in No. 318 or 323 raised any questions or opposition before the District on the proposed Senate Reapportionment plan. Your petitioner urges this Court to consider that none of the issues now raised as presenting Substantial Questions to justify probable jurisdiction, were raised before the District Court by either Appellants in Nos. 318 or 323. The questions now raised have been resolved either by the District Court in its February 17, 1965 decision or in the decision of the Hawaii State Supreme Court on July 27, 1964.

Appellants appear to rest their claim of a timely Appeal on the ground that the February 17, 1965 Order, was "filed" on February 17, 1965, but was not "entered" until April 9, 1965, some 7 weeks later. They offer no reasons for the delay in "entry", except possibly an oversight on the part of the Clerk of the District Court. There is no entry on the Docket (Civil Docket No. 2308) or order of the District Court to stay or postpone entry of its Order. The April 28, 1965 Decision and Order was filed and entered on the same day, April 28th. As a practical matter all parties received the February 17, 1965 Decision and Order. The petition of

all parties which led to the Mar
Order makes this abundantly clea

Your Petitioner is somewhat av
to raising a technical, procedur
question - particularly if it wo
deprive any party of his rights,
lead to any inequity. Under the
cumstances of this proceeding he
lieves that equity would be best
served by raising all legitimate
questions to assure the citizens
this State their Constitutional
rights, rights under their State
Constitution -- not in conflict
the U. S. Constitution or the Su
Court decisions of June 15, 1964

Your Petitioner submits that
changes in the Hawaii State Cons
tution can be made only in the m
set out by the document itself --
Article XV. That article, as th
Proceedings of the Constitutiona
vention will amply support, was
written with the experience of m
than 40 years of failure by legi
tures of the Territory of Hawaii
reapportion in accordance with t
Organic Act of April 1900. Sect
of the Organic provided in part

*"The legislature, at its first
gular session after the census
enumeration shall be ascertain
and from time to time thereaft
shall reapportion the membersh
in the senate and house of rep
tatives among the senatorial a
represenative districts on the
basis of the population in eac
said districts who are citizen
the Territory."* (Emphasis adde

No reapportionment took place - there were always explanations why it couldn't be done!

When the delegates wrote the State Constitution they made it clear that the legislature would have no responsibility in reapportionment. They also wrote the district boundaries into the Constitution. They did give the legislature authority to propose constitutional amendments, subject to approval of the people, by referendum, prior to effectuating any changes in the Constitution. What is being proposed now by Appellants is to vitiate the provisions of the Constitution, by usurping the right of the people to determine the structure of their government. The suggestion that Legislative Reapportionment be put into effect as the Courts' plan, is a transparent subterfuge -- a legal fiction to subvert the clear language of the State Constitution. Equally obnoxious to the State Constitution is the contention that the people be given the opportunity to vote on a Constitutional Amendment after the "temporary" statutory plan is put into effect. This is no real choice. Should the people vote the amendment down, the individuals elected to office -- under their own plan, would still hold office for at least two years, until the next general election.

It should be noticed that the legislature which urges that it has "plenary" or "inherent" powers is mal-apportioned under the June 15, 1964 cases.

SECTION III. Question Presented.

The only question is whether it was an error for the District Court to have decreed that the Legislature of Hawaii shall adopt legislation, pursuant to Article XV of the Constitution of the State of Hawaii, providing for submission to the people of Hawaii the question "Shall there be a convention to prepare a revision of or amendments to the Constitution?" "and for any and all acts required by law to implement such legislation, and further providing in the event of an affirmative vote, for election of delegates to a constitutional convention and for an election on any proposed amendments adopted by the constitutional convention, said amendments including, but not limiting the convention thereto, provisions reapportioning the Senate of Hawaii on a constitutionally valid basis."

We believe that the issue in this respect is clear. The Supreme Court of Hawaii in its decision of July 27, 1964 said in part:

"In the light of the decisions handed down by the United States Supreme Court on June 15, 1964, we take cognizance of the indisputable invalidity of Article III, section 2 of the State Constitution, relating to the composition and apportionment of the State Senate. The problems thus raised will be considered first from the standpoint of permanent reapportionment and then from the standpoint of a temporary reapportionment plan.

"At least in the initial stages of the problem presented by the invalidity of this provision, the question whether such invalidity can be cured by act of the legislature itself, or requires an amendment of the State Constitution, is one of local law, not federal constitutional right. We note that the Supreme Court has said that 'the delay inherent in following the state constitutional prescription for approval of constitutional amendments *** cannot be allowed to result in an unpermissible deprivation of [the] right to an adequate voice in the election of legislators ***.' Roman v. Sincock, supra. But that was said in a case where, at the time of rendition of the Supreme Court opinion, the case had been pending for two years during which a constitutional amendment had been achieved but had proved invalid. We see no indication that the matter of the machinery to be used to cure the invalidity of the Senate plan presents a federal question at the inception of Hawaii's efforts in that direction....The point now of importance is that the quoted provision as to a majority vote in a majority of the counties should prove to be unconstitutional, that would not render invalid the requirement that the change be by constitutional amendment."

The District Court in its decision of February 17, 1965, agreed with the Supreme Court of Hawaii. It said in part:

> *"As pointed out by the Supreme Court of Hawaii....any change in the representation from any senatorial district must be by constitutional amendment. This court concurs!"*

We believe that a review of the Hawaii State Constitution and the Proceedings of the Constitutional Convention, dealing with the section on Revision and Amendment (Article XV) and the Procedures for Reapportionment, makes it abundantly clear that the Constitution of Hawaii, for reasons clearly set out in the Debates of the Convention, eliminates Legislative Responsibility in apportionment or reapportionment--except for proposing a Constitutional amendment for prior approval by the people in a referendum. This provision is unique among the 50 States of the Union.

Your petitioner believes that the rights of the people of the State under their Constitution should not be altered by a legislative (statutory) reapportionment, and that the plain requirements of the State Constitution as construed by the Hawaii Supreme Court and concurred in by the Court below should be upheld.

SECTION IV. Statement of the Case:

Your petitioner submits to this Court that there is no real case or controversy on the question of the constitutionality of the provisions regarding the Hawaii Senate. Everyone has agreed on their invalidity in light of the Supreme Court Decisions on June 15, 1964. As stated in the February 17, 1965 District Court decision:

"All parties before this court conceded (as was also determined by the Supreme Court of Hawaii in Guntert v. Richardson, 47 Hawaii ___ (July 27, 1964) that Article II, Section 2, relating to the composition and apportionment of the State Senate is indisputably invalid under Reynolds v. Sims, supra).

The record also shows that appellants supported the legislation submitted to the District Court pursuant to the March 9th order, and that this legislation sought to deal only with the Senate. Since the parties are in agreement as to the issue and did not object to the presentation of the Senate plan, it is hardly proper for them to now claim that a controversy exists on matters other than the Senate.

The only real issue then is whether the Hawaii Legislature must handle the matter of Senate Reapportionment in accordance with the provisions of the Hawaii State Constitution. This,

petitioner contends, is a matter of local law which has already been determined by the Hawaii Supreme Court in Guntert v. Richardson, supra, a decision from which no appeal was taken.

Section V. The Questions Presented Are Not Substantial:

This appeal presents no substantial question. As shown above, all parties to the litigation (1) agreed that the present constitutional provisions regarding the Senate violate the due process and equal protection clause of the 14th Amendment of the United States Constitution, and (2) supported the legislation for the temporary reapportionment of the Senate only. The controversy, then, is over the procedure for reapportioning the Senate, not the necessity for doing so, or the merits or demerits of such a plan.

The procedure for amendments and revision of the State Constitution is set forth in Article XV of the Constitution of Hawaii and this procedure must be followed. The decision of the Supreme Court of Hawaii and the Court below have fully, fairly and adequately decided this issue and determined complete guidelines for a Plan of constitutional reapportionment which meets the requirements of the 14th Amendment and the decisions of this Court and the State Constitution.

Section VI. Conclusion.

For the foregoing reasons the appeals should be dismissed and the order below affirmed.

Respectfully submitted,

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Richard K. Sharpless
Counsel

July 1965

CORRECTED COPY

FILED

DEC 17 1965

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

Nos. 318, 323 and 409

JOHN A. BURNS, Governor of the State of Hawaii,
Appellant,

—v.—

WILLIAM S. RICHARDSON, *et al.*,
Appellees.

ELMER F. CRAVALHO, *et al.*,
Appellants,

—v.—

WILLIAM S. RICHARDSON, *et al.*,
Appellees.

KAZUHISA ABE, *et al.*,
Appellants,

—v.—

WILLIAM S. RICHARDSON, *et al.*,
Appellees.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

BRIEF FOR JOHN A. BURNS, GOVERNOR OF THE STATE OF HAWAII

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December 1965

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

Nos. 318, 323 and 409

JOHN A. BURNS, Governor of the State of Hawaii,

Appellant,

—v.—

WILLIAM S. RICHARDSON, *et al.*,

Appellees.

ELMER F. CRAVALHO, *et al.*,

Appellants,

—v.—

WILLIAM S. RICHARDSON, *et al.*,

Appellees.

KAZUHISA ABE, *et al.*,

Appellants,

—v.—

WILLIAM S. RICHARDSON, *et al.*,

Appellees.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

BRIEF FOR JOHN A. BURNS, GOVERNOR OF THE STATE OF HAWAII

OPINIONS BELOW

The opinion of the District Court dated February 17, 1965, and entered April 9, 1965, is reported at 238 F. Supp. 468, and appears at R. 62-81. Its opinion dated April 28, 1965, is reported at 240 F. Supp. 724 and appears at R. 151-65. In addition, a short unreported opinion of the District Court, dated March 9, 1965, granting a motion to alter or amend the judgment of February 17, 1965, appears at R. 88-91; and an informal memorandum opinion, dated March 31, 1965, is attached as Appendix B hereto, pp. 28a-29a, *infra*.[1]

JURISDICTION

The basis of jurisdiction in the District Court was the Civil Rights Act, 42 U. S. C. §§ 1983, 1988, and 28 U. S. C. § 1343. Pursuant to 28 U. S. C. §§ 2281 and 2284, a three-judge District Court was convened.

The jurisdiction of this Court rests on 28 U. S. C. §§ 1253 and 2101(b). The first of the orders of the District Court from which the appeal is taken was dated February 17, 1965, but was not entered until April 9, 1965 (R. 195); the second was dated and entered on April 28, 1965. (R. 197) The essential portions of the first order had been stayed and reopened by the District Court in response to a timely motion, (R. 88-91) and were not reinstated until April 28, 1965. (R. 164) The notice of appeal in No. 318 was filed on May 3, 1965 (R. 165), and the notices of appeal in Nos. 323 and 409 were filed on May 7, 1965 (R. 180, 184); notices all were timely as to both the February and April orders. See *United States* v. *Crescent Amusement Co.*, 323

[1] This informal memorandum opinion was circulated among the judges of the District Court and released to the parties.

U. S. 173, 177 (1944); *Leishman* v. *Associated Wholesale Electric Co.*, 318 U. S. 203, 205-06 (1943); *Zimmern* v. *United States*, 298 U. S. 167, 169 (1936). See also 28 U. S. C. § 2101; Fed. R. Civ. P. 58; *United States* v. *Hark*, 320 U. S. 531, 534 (1944).[2]

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the United States Constitution, Amendment XIV, Section 1; the Hawaii Constitution, Article III, Sections 1, 2, 3, 4, and portions of Section 11, Article XV, Sections 1, 2, 3 and 4, and Article XVI, Section 1; House Bills 987 and 773, 3d Hawaii Legislature (1965); and Act 334 of the Session Laws of Hawaii, Regular Session of 1949. These provisions are set forth in Appendix A.

QUESTIONS PRESENTED

1. Whether the District Court erred in affirmatively upholding the constitutionality of the parts of Article III of the Hawaii Constitution which govern the apportionment of the House of Representatives and certain aspects of the apportionment of the Senate even though the court had held that the part of Article III fixing the number of Senators per Senatorial district was unconstitutional? [Part I.A., pp. 29-42]

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[2] Judicial Code § 2101, Rule 58, and the *Hark* case support the proposition that these appeals were timely as to the February order since the time would, in any event, even if the order had not been suspended, be measured from the date of the order's entry, April 9. The other authorities teach that the suspension of the February order until April 28, 1965, makes the latter date the relevant date for appeal.

2. Whether the measure of "registered voters" is a valid basis under the Equal Protection Clause for the apportionment of seats in the Hawaii Legislature? [Parts I.B., II., pp. 42-70; 96-97]

3. Whether the present districting of the Hawaii House of Representatives into districts with varying numbers of Representatives violates the Equal Protection Clause by arbitrarily discriminating against persons in districts with a small number of Representatives and against minorities in districts with a large number of Representatives? [Part I.C., pp. 70-85]

4. Whether the District Court abused its discretion or committed errors of law in ruling that (a) the Hawaii Legislature could not adopt a provisional reapportionment plan; (b) the permanent reapportionment plan thereby required in the first instance had to be put into effect before the 1966 general elections; (c) the constitutional amendment effecting the permanent reapportionment had to be proposed by a constitutional convention, rather than by the Legislature; and (d) such constitutional convention was not required to be apportioned on the basis of population? [Part I.D., pp. 85-94]

5. Whether the District Court's injunction prohibiting the Legislature, on the fifty-eighth day of its regular sixty-day session in 1965, from enacting legislation essential for the normal operation of state and municipal offices in Hawaii and essential for the continuation of programs for the health and welfare of the people of Hawaii, until such time as reapportionment legislation had been passed, amounted, under the circumstances, to an abuse of discretion, and whether a similar injunction rendered under

similar circumstances at subsequent sessions, would likewise amount to an abuse of discretion? [Part I.D., pp. 95-96]

6. Whether the District Court correctly held that the provisional Senate reapportionment plan's arbitrary districting discriminated in favor of the representational power of people living within the largest multimember districts, and submerged the minorities within these districts, in violation of the Equal Protection Clause; and, whether, in any event, the District Court was justified in declining to approve that plan? [Part II., pp. 96-106]

STATEMENT

In these consolidated appeals, the Governor of Hawaii, as appellant in No. 318, is challenging certain portions of the orders of a special three-judge District Court for the District of Hawaii, convened pursuant to 28 U. S. C. §§ 2281 and 2284. The portions in question affirmatively declared "valid and constitutional" under the Federal Constitution the apportionment of the Hawaii House of Representatives and certain aspects of the apportionment of the Hawaii Senate. They also imposed certain procedural limitations on the legislative reapportionment in Hawaii—a reapportionment which was necessitated by the court's finding that the Hawaii Senate was unconstitutionally apportioned in respect of the number of Senators per Senatorial District, as all parties urged or conceded. In Nos. 323 and 409, the Governor, as appellee, is supporting the District Court's order rejecting a plan to reapportion the Hawaii Senate proposed to the District Court in April 1965 by the Hawaii Legislature. Pursuant to stipulation among the parties, this consolidated brief is submitted by the Governor as the opening brief in these three appeals.

A. Background

1. *The distribution of population and registered voters in the State of Hawaii.*—According to the 1960 federal census, the total population of Hawaii was 632,772 persons. (R. 54) The number of persons who were registered voters in 1958 was 175,317; in 1960 was 202,059; in 1962 was 221,650; and in 1964 was 239,285. (R. 54)

The State of Hawaii consists of a series of islands, many of which are separated by deep channels and broad expanses of water. The State is geographically divided into four basic areas, each consisting of a main island and, in some instances, small and usually uninhabited islands in close proximity to it. The four basic areas are Hawaii,[3] Maui, Oahu, and Kauai. Politically, each of these basic areas is a county; or, in the case of Oahu, a city and county—the City and County of Honolulu.[4] The distribution of population and registered voters among these areas is shown in the following table:

		Registered Voters			
Area	Population 1960	1958	1960	1962	1964
Hawaii	61,332	25,534	26,059	27,194	28,098
Maui	42,855	16,755	17,539	18,325	18,752
Oahu	500,409	121,647	147,123	164,324	180,169
Kauai	28,176	11,381	11,338	11,807	12,266
					(R. 55)

[3] Colloquially, the "Big Island." (R. 248) It is located about two hundred miles southeast of Oahu, the population center of the State.

[4] The county name for each of the basic areas, other than Oahu, is the same as the name of the main island in the basic area—Hawaii, Maui, and Kauai. In addition there is a fifth county, Kalawao, which is a Hansen's disease treatment area. This county is located on the island of Molokai, the remainder of which is part of Maui County. Kalawao County votes with Maui County for state legislators.

2. *The apportionment of the Hawaii Legislature under Article III of the Constitution of the State of Hawaii.* A constitutional convention, convened in 1950 by the Legislature of the then Territory of Hawaii, established the present scheme of legislative apportionment in Hawaii.

Article III, Section 1, of the Constitution provides that the legislative power of the State is vested in a bicameral Legislature, consisting of a Senate and of a House of Representatives, and extends "to all rightful subjects of legislation not inconsistent with this constitution or the Constitution of the United States."

The Senate.—Section 2 provides for a Senate of twenty-five members elected by the qualified voters of the Senatorial Districts. The geographical boundaries of the districts and the number of Senators to be elected from each are specified in the constitution. Six districts—all multi-member—were established. Hawaii and Oahu were each divided into two districts, while Kauai and Maui, with their neighboring islands, each constituted a single district.

The districts, the number of Senators to which they were entitled, and the population and registered voters of each are as follows:

Senatorial Districts	Population 1960	Registered Voters 1958	1960	1962	1964	Senators
First—Hawaii	44,297	19,031	19,266	20,053	20,739	5
Second—Hawaii	17,035	6,503	6,793	7,141	7,359	2
Third—Maui	42,855	16,755	17,539	18,325	18,752	5
Fourth—Oahu	182,307	62,398	73,981	80,490	87,209	5
Fifth—Oahu	318,102	59,249	73,142	83,834	92,960	5
Sixth—Kauai	28,176	11,381	11,338	11,807	12,266	3

(R. 55)

Under this Section, 21% of the 1960 population of the State (residents of the First, Second, Third, and Sixth

Senatorial districts) elects 60% of the Senate, while 79% of the population elects only 40% of the Senate. (R. 55) The deviations between (i) the average number of persons (or registered voters) per Senator in the State and (ii) the number of persons (or registered voters) per Senator in certain Senatorial Districts may be illustrated by the following table:

	Population per Senator 1960	Registered Voters per Senator — 1958	1960	1962	1964
Average in State per Senator (25 Senators)	25,311	7,012	8,082	8,866	9,571
2nd—Hawaii (2 Senators)	3,518 (lowest)	3,251 (lowest)	3,396 (lowest)	3,571 (lowest)	3,678 (lowest)
4th—Oahu (5 Senators)	36,461	12,479 (highest)	14,796 (highest)	16,098	17,442
5th—Oahu (5 Senators)	62,620 (highest)	11,850	14,628	16,767 (highest)	18,592 (highest) (R. 56)

The Hawaii Constitution specifies constitutional amendment as the only means by which this districting and apportionment scheme may be altered, and Article XV, Section 2, provides that:

> " . . . no constitutional amendment altering . . . the representation from any senatorial district in the senate shall become effective unless it shall also be approved by a majority of the votes tallied upon the question in each of a majority of the counties."

The House of Representatives.—Section 3 of Article III provides for a House of Representatives of fifty-one members elected by the qualified voters of eighteen Representative Districts. The boundaries of the Representative Districts and the number of Representatives initially appor-

tioned to each are specified in Article XVI of the Constitution. Each district had between one and six Representatives. The County of Hawaii was divided into five districts electing eight Representatives, Maui into two districts electing six Representatives, Oahu into ten districts electing thirty-three Representatives, and Kauai into one district electing four Representatives.

Pursuant to Section 4 of Article III, the Governor of Hawaii in 1959 reapportioned the fifty-one Representatives among the eighteen districts. Section 4 provides that in 1959, and in each tenth year thereafter (1969, 1979, etc.), the Governor shall reapportion the House according to the following procedure. First, the fifty-one Representatives are to be apportioned among the four basic areas of the State by applying the method of equal proportions to the number of voters registered during the most recent general election. No basic area, however, may receive less than one representative. Then, the number of Representatives allocated to each basic area is to be apportioned among the existing Representative Districts within that area. Again, the method of equal proportions is to be applied to the number of voters registered during the most recent general elections in each Representative District. If during this reapportionment the Governor discovers that an existing district contains less than half the number of registered voters which is the average number of registered voters per Representative in the State, he is to redistrict the basic area in question so that each district contains more than half of the average number.[5]

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[5] This provision constitutes the only means of redistricting the House other than by constitutional amendment.

The allocation of Representatives among the existing districts arrived at by the Governor in 1959 by applying the method of equal proportions to the number of registered voters in the 1958 general election is as follows:

Representative Districts	Population 1960	Registered Voters 1958	1960	1962	1964	Representatives
First—Hawaii	5,030	2,209	2,257	2,319	2,399	1
Second—Hawaii	31,553	13,836	14,036	14,706	15,274	3
Third—Hawaii	7,714	2,986	2,973	3,028	3,066	1
Fourth—Hawaii	11,369	3,862	4,073	4,239	4,329	1
Fifth—Hawaii	5,666	2,641	2,720	2,902	3,030	1
Sixth—Maui	7,138	2,560	2,574	2,739	2,897	1
Seventh—Maui	35,717	14,195	14,965	15,586	15,855	4
Eighth—Oahu	68,281	13,876	18,309	22,450	27,073	4
Ninth—Oahu	42,816	5,929	7,410	7,973	8,934	2
Tenth—Oahu	95,118	12,926	17,009	20,861	23,859	4
Eleventh—Oahu	57,743	10,525	12,553	14,401	15,148	3
Twelfth—Oahu	25,552	8,372	10,000	10,889	11,500	3
Thirteenth—Oahu	28,592	7,621	7,807	7,260	6,446	2
Fourteenth—Oahu	42,476	14,134	16,056	17,305	18,571	4
Fifteenth—Oahu	60,125	21,063	25,869	28,685	31,302	6
Sixteenth—Oahu	42,750	13,746	16,176	17,072	18,201	4
Seventeenth—Oahu	36,956	13,455	15,880	17,428	19,135	4
Eighteenth—Kauai	28,176	11,381	11,338	11,807	12,266	3

(R. 55)

The average number of persons per Representative throughout the State is 12,407. The actual number of persons per Representative in the First District (Hawaii) is 5,030, while the actual number of persons per Representative in the Tenth District (Oahu) is 23,779. These figures, along with similar figures based upon registered voters demonstrating the extent of the deviations, are shown in the following table:

	Population per Representative 1960	Registered Voters per Representative			
		1958	1960	1962	1964
Average in State per Representative (51 Representatives)	12,407	3,437	3,962	4,346	4,691
1st—Hawaii (1 Representative)	5,030 (lowest)	2,209 (lowest)	2,257 (lowest)	2,319 (lowest)	2,399 (lowest)
8th—Oahu (4 Representatives)	17,070	3,469 (highest)	4,592 (highest)	5,610 (highest)	6,768 (highest)
10th—Oahu (4 Representatives)	23,779 (highest)	3,231	4,251	5,215	5,965

(R. 56)

If reapportionment were based on 1960 population rather than 1958 registered voters, the number of Representatives allocated to each basic area would be substantially different: the County of Hawaii five rather than seven; Maui four rather than five; Oahu 40 rather than 36; and Kauai two rather than three. (Plaintiffs' Ex. 1, R. 339)

B. The Present Proceedings

1. *The complaint and the parties.*—On August 13, 1964, shortly after this Court's reapportionment decisions of June 1964, this action was commenced by certain residents, taxpayers, and qualified voters of the City and County of Honolulu.[6] The complaint alleged that the sections of the

[6] The suit was brought against the Lieutenant Governor of Hawaii in his capacity as the state officer responsible for supervising state elections.

Hawaii Constitution relating to legislative apportionment violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. The complaint alleged that (a) the Senate was apportioned on the basis of geography rather than of population, and accordingly Senatorial Districts containing 21% of the population elected 49% of the total number of Senators; (b) the House of Representatives was apportioned on the basis of registered voters rather than of population, with the result that plaintiffs' districts had fewer Representatives than if apportionment had been based on population; (c) the apportionment of the Senate and the House of Representatives of the Hawaii State Legislature was an integrated apportionment scheme for overall legislative representation and the apportionment of the House of Representatives was not severable from that of the Senate; and (d) the application of the apportionment provisions of the State Constitution resulted in a grossly unfair weighting of both houses of the Legislature in favor of the lesser populated areas of the State and therefore in an unconstitutional apportionment of both houses. (R. 1-13)

A declaratory judgment was sought that the Due Process and Equal Protection Clauses were violated by this scheme of legislative apportionment and that the Hawaii State Legislature had the power provisionally to apportion the Legislature by statute pending the adoption of a constitutional amendment.[7]

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[7] Plaintiffs also requested that the Lieutenant Governor be enjoined from performing his election duties unless the Legislature passed a valid reapportionment plan to be used in the 1964 election, that he be ordered to conduct the 1964 election on an at-large basis, or that the court provide a constitutional apportionment plan for the conduct of the 1964 elections. The plaintiffs requested that, if these requests were denied, the court should re-

A three-judge court was convened and allowed the Governor, who joined substantially in the plaintiffs' allegations and prayer for relief, to intervene as a plaintiff.[8] (R. 37-41; 191) Various State Senators and Representatives also intervened as defendants. (R. 42-53; 191)

2. *The February order.*—The court denied preliminary injunctive relief and, after an evidentiary hearing, rendered a decision dated February 17, 1965, and entered April 9, 1965. That decision held that the provisions of Article III of the Hawaii Constitution fixing the number of Senators per Senatorial District were unconstitutional[9] but affirmatively ~~declaring~~ declared that the remainder of Article III, including the provisions relating to the apportionment of the House of Representatives, was constitutional. (R. 62-81) The District Court also invalidated the provisions of Article XV, Section 2, of the Hawaii Constitution, requiring a majority vote of the electorate of each of a majority of the counties to amend the Constitution's Senatorial apportionment scheme. (R. 66, 79; 238 F. Supp., at 471-72, 478)

The District Court held that Sections 3 and 4 of Article III, dealing with apportionment of the House of Repre-

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tain jurisdiction of the case to review proposed apportionment plans, and, if such were not forthcoming, to devise and effect an appropriate apportionment plan.

[8] The Governor is a citizen, taxpayer, and elector of the State of Hawaii and a qualified voter in Hawaii's Fifth Senatorial District and Eighth Representative District. (R. 38) Therefore, whether or not he has standing in his capacity as Governor and as a representative of the people of Hawaii, he may prosecute the appeal in No. 318. See *Baker* v. *Carr*, 369 U. S. 186, 204 n. 23 (1962).

[9] All parties had admitted that the Senate had been apportioned on the basis of geography rather than population and therefore that the Senate apportionment provisions violated the Equal Protection Clause. (R. 65; 238 F. Supp., at 471)

sentatives, were severable from Section 2, dealing with Senate apportionment because there was "no evidence . . . that the Constitutional Convention would have apportioned the house in any other way than it did" if it had known that the Senate's apportionment scheme was invalid. (R. 66; 238 F. Supp., at 472) Therefore, it held that the provisions relating to the House did not fall with the unconstitutionality of the provisions relating to the apportionment of Senators.

Turning to the validity of the apportionment in the House thus viewed apart from that of the Senate, the court upheld the "registered voters" measure of representation used in the House. The court looked to whether the "registered voters" measure, when adopted in 1950 and used for reapportionment in 1959, resulted in an apportionment substantially on the basis of population. (R. 68; 238 F. Supp., at 472-73) The court indicated that the Census Bureau's figures on total population were not an "accurate or reliable method of determining the true number of *residents* of a given area" of Hawaii (1) because of a large and fluctuating number of military personnel in the State, concentrated mainly on Oahu, (2) because of the large number of tourists initially tabulated by the Census Bureau in Hawaii, and (3) because census tract boundaries do not often coincide with precinct and district lines in Hawaii. (R. 70-75; 238 F. Supp., at 473-76) Moreover, the court held that the percentage of registered voters per eligible voters in the State as a whole was high, and that deviations were slight between the number of Representatives each basic area would receive on the basis of registered voters and on the basis of civilian population. (R. 73-74; 238 F. Supp., at 475-76)

The court held that the districting of the House was constitutional, thus approving the House use of multi-member districts. (R. 77, 79-80; 238 F. Supp., at 477, 478-79) It also held that the provision for reapportionment by the Governor in 1959 and every tenth year thereafter—*i.e.*, in the year preceding the federal census—was valid. (R. 77; 238 F. Supp., at 477) The court thereupon entered an affirmative decree that all the provisions of Article III, except those fixing the number of Senators per Senatorial District, were "constitutional and valid." (R. 79; 238 F. Supp., at 478)

The District Court denied the power of the Hawaii Legislature to enact provisional reapportionment legislation, holding that "any change in the representation from any senatorial district must be by constitutional amendment." (R. 78; 238 F. Supp., at 478) The court considered the two specified methods by which amendments to the Hawaii Constitution may be initiated[10] under Article XV of that Constitution: (1) by a constitutional convention proposed by the Legislature by statute and called by the electorate, or (2) by the Legislature by a two-thirds vote at one session, or by majority votes in each of two successive sessions. Because the Legislature had not initiated an amendment during its 1964 special reapportionment session and because it appeared therefore unlikely to the court that any legislatively-initiated measure would be adopted before the 1966 elections, the court held that a convention must be convened. It accordingly enjoined the Legislature from taking final action on any legislation, except that necessary to hold the 1965 session, until the Legislature passed a statute pro-

[10] After initiation, final approval of the amendments must come from the electorate. Hawaii Const., Art. XV, §§ 2, 3.

posing a convention to the electorate.[11] (R. 78; 238 F. Supp., at 478) Jurisdiction was retained for all purposes, including that of judicially reapportioning the Senate in the event of failure of adoption of an appropriate amendment in time for the 1966 elections. (R. 81; 238 F. Supp., at 479)

3. *The Legislature's Senate Plan.*—On March 9, 1965, on the motion of intervening defendant legislators, the court amended its order of February 17, 1965, to allow the Legislature to enact a provisional reapportionment plan and to propose a constitutional amendment by legislation instead of by constitutional convention. Under the amended order, the legislators were enjoined from taking final action on any legislation until the Legislature had (1) enacted a reapportionment and redistricting plan for the Senate, on the basis of 1964 registered voters, to be applicable to the 1966 elections, (2) adopted a proposed constitutional amendment embodying pertinent provisions of the provisional plan, to be presented to the electorate for ratification at the 1966 general election,[12] and (3) provided for submission to the electorate at the 1966 general election the question: "Shall there be a convention to propose a revision of or amendments to the Constitution?" (R. 88-91) These measures were to be enacted by the Legislature and submitted to the court for approval.

Pursuant to this order, the Hawaii Legislature at first considered an abortive effort to reapportion the Senate by

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[11] As will be developed below, it is not clear whether the injunction has any application other than to the 1965 regular session of the Third Legislature. See pp. 95-96, *infra*.

[12] It should be noted that the court thus affirmatively required that the basis for apportionment be 1964 registered voters, both as to the provisional and as to the permanent plan.

keeping the existing six Senatorial Districts and dividing the 25 Senators among them on a "registered voters" basis. Thus the two Oahu districts were assigned, respectively, ten and nine of the 25 Senators. The District Court informally indicated disapproval of the proposal, which was not enacted or further heard from. (App. B., pp. 28a-29a, *infra*)

After further consideration, in April the Legislature enacted two bills reapportioning the Senate.[13] House Bill No. 987 provided for a provisional reapportionment of the Senate (R. 113-17); House Bill No. 773 consisted of a proposal to the electorate, in substantially the same terms, to amend the provisions of the Hawaii Constitution relating to Senate apportionment.[14] (R. 140-45)

The plan continued the number of Senators at twenty-five[15] and specified the boundaries of the Senatorial Districts and the number of Senators from each district. Each "basic area" was guaranteed at least one Senator. The previous division of the County of Hawaii into two Senatorial Districts was abandoned in favor of a single district electing three Senators. Oahu, which had previously been divided into two Senatorial Districts electing five Senators each, was now divided into five new Senatorial Districts, four of which were to elect four Senators each and the fifth to elect three Senators. These districts largely were the same as the existing Representative Districts.

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[13] H.B. No. 773, S.D. 1, C.D. 1, 3d Legis. (1965); H.B. No. 987, S.D. 1, C.D. 1, 3d Legis. (1965).

[14] Responsive to the final element of the Court's March order, House Bill No. 986 submitted the question concerning the convening of a constitutional convention to the electorate. (R. 147)

[15] The provision of Article III fixing the number of Senators at twenty-five had been affirmatively declared constitutional and valid by the court in its February order. See p. 15, *supra;* p. 29, *infra.*

The measure of the apportionment was the number of 1964 registered voters. Under this method, the following apportionment was provided:

Senatorial Districts		Number of Senators	1964 Registered Voters
Hawaii	First	3	28,130
Maui	Second	2	18,786
Oahu	Third	3	27,073
	Fourth	4	35,780
	Fifth	4	39,361
	Sixth	4	40,629
	Seventh	4	37,336
Kauai	Eighth	1	12,266
		25	239,361

(R. 411)

Under the Legislature's plan, the average number of registered voters per Senator would have been 9,574. The most underrepresented district would have been the Eighth (Kauai), with 12,266 registered voters per Senator. The most overrepresented district would have been the Fourth, on Oahu, with 8,945 registered voters per Senator.

The Legislature's plan further provided that the Governor of Hawaii should reapportion the Senate, in 1975 and every tenth year thereafter, using the method described in Article III of the Constitution for reapportionment of the House of Representatives.[16]

4. *The District Court's decision holding the Legislature's Senate plan invalid.*—These bills were submitted for District Court review by the intervenor-defendants on April 14, 1965. On April 19, 1965, the court stayed its injunction

[16] See p. 9, *supra*.

against the enactment of legislation, pending its ruling on the bills. (R. 150) On April 28, 1965, the court issued a decision disapproving the provisional plan for reapportionment of the Senate, reinstating the injunction against enactment of legislation, and holding that a constitutional convention must be called to initiate a reapportionment plan. (R. 151-65)

Earlier in April the District Court had informally expressed its opinion to the parties concerning the validity of multimember Senatorial Districts. The court had said:

> "We believe that the Senate should be redistricted into single senatorial districts, although we may approve two-member districts if and only if the legislature can affirmatively show substantial reasons therefor. There may very well be valid reasons for one or two 2-member districts in the neighboring islands but we perceive no justification whatsoever for other than single member districts on the Island of Oahu, particularly the heavily populated areas thereof." (App. B., p. 28a, *infra*)

In its April 28, 1965, opinion the District Court acknowledged that the provisional Senate apportionment conformed to the standards of the method of equal proportions.[17] (R. 155; 240 F. Supp., at 727) Despite this, the court found that the plan did not afford equality of representation. The court found that the criteria considered in redistricting were compactness, contiguity, number of 1964 registered voters, geographical boundaries, and historical Representative District boundaries.[18] Because of the Legis-

[17] Using, of course, a "registered voters" measure.

[18] "Apparently, ethnic, political, industrial, economic, social, occupational factors, and community of interests and problems

lature's reliance on existing Representative District lines, the court analyzed the Representative Districts. The court found that at least one district was clearly too large, the Fifteenth on Oahu with six Representatives, and that a number of others contained socially, economically, and geographically disparate groups. (R. 157-58; 240 F. Supp., at 728-29)

Emphasizing that apportionment of one house of a bicameral legislature must complement the other in order to cancel the inequities necessarily inherent in most single-house apportionments, the court held not only that the proposed plan failed to complement the existing House of Representatives apportionment, but also that the congruity of certain multimember Senate District boundaries with boundaries of the multimember Representative Districts intensified inequality of voting power. (R. 159-63; 240 F. Supp., at 729-31) For instance, the Third Senatorial District was coterminous with the Eighth Representative District, resulting in seven legislators who would represent the same constituency. Therefore, the political power of residents of these districts would be disproportionately high as compared with that of residents of other districts. Moreover, the minorities within such a district would be effectively submerged as to both House and Senate representation. No sufficient justification for this inequality of representation or for the boundary construction of the districts was found.

The court also found that multimember districts were used for purposes of gerrymandering to protect incumbent Senators. (R. 163; 240 F. Supp., at 732) Therefore, the

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were given little if any consideration by the legislature." (R. 156; 240 F. Supp., at 728)

plan was disapproved, and the injunction against final legislative action was reinstated—on the fifty-eighth day of a sixty-day legislative session.

5. *The appeals to this Court.*—In May, 1965, the Governor filed his notice of appeal to this Court, (R. 165) and certain intervenor-defendant Representatives, appellants in No. 323, and certain intervenor-defendant Senators, appellants in No. 409, filed their notices of appeal. (R. 180, 184)

On May 7, 1965, the Governor filed a motion in the District Court to suspend the injunction against the legislators and to stay the order of April 28, 1965, pending determination of his appeal to this Court. (R. 168) The District Court denied this motion on May 11, 1965. (R. 188) On May 13, 1965, the Governor applied to Mr. Justice Douglas for a stay of the injunction against enactment of legislation. By order dated May 21, 1965, Mr. Justice Douglas granted the stay.

On October 11, 1965, this Court noted probable jurisdiction in Nos. 318, 323, and 409 and consolidated these appeals. (R. 412)

SUMMARY OF ARGUMENT

I. The District Court erred in a number of important respects in the orders under review. Its fundamental error was in affirmatively holding valid the remaining terms of the Hawaii Constitution's legislative apportionment provisions, despite the fact that it struck down material provisions of the Senate apportionment. Apart from this, the court erred in sanctioning the "registered voters" measure of apportionment and the multimember districting employed in the House of Representatives. It also erred in certain matters going to remedies.

A. 1. The District Court undertook, after holding the Hawaii constitutional provisions fixing the number of Senators per Senatorial District invalid, to hold the remaining provisions dealing with legislative apportionment "constitutional and valid." It thus upheld, among other things, the apportionment of the House. This holding was a flat contradiction of the teachings of this Court in *Maryland Committee* v. *Tawes*, 377 U. S. 656, 673 (1964). A court must consider the validity of a bicameral system as a whole and the remainder of the system cannot be declared valid if any material part of it is invalid.

2. Moreover, the apportionment of the Hawaii House and the Hawaii Senate are interdependent as a matter of fact. The use of the bicameral system, the details of the provisions of the Legislative Article, and its legislative history all confirm this. And this interrelationship extends to other provisions of the legislative apportionment scheme, such as the details of the measure of representation and the number of legislators.

3. The District Court's error in affirmatively upholding the terms of the legislative apportionment provisions, apart from the provisions fixing the number of Senators per Senatorial District, has already embarrassed the course of orderly reapportionment in Hawaii. It was responsible for the patently invalid Senate plans formulated by the Legislature in March and April 1965. It has the effect as a legal matter of preventing the Legislature—or the court itself while its ruling stands—from adopting an appropriate, comprehensive, bicameral reapportionment scheme. Moreover, as a practical matter it will tend to foreclose reexamination of the apportionment of the House in the framing of a permanent plan through constitutional amend-

ment, and thereby destroy the essential flexibility which should exist in any consideration of reapportionment.

B. The District Court erred in declining to hold unconstitutional the "registered voters" measure of apportionment employed in the Hawaii House of Representatives. The use of that measure is not permissible in itself; in Hawaii it does not as a matter of fact produce an apportionment substantially equivalent to that which would be the case under a permissible method; and it cannot be affirmatively upheld on a continuing basis, as is the effect of the District Court's order.

1. This Court's decisions teach that the equality of representation which the Equal Protection Clause demands is to be measured on a population basis. This is in accord with the settled practice in the federal House of Representatives and in the overwhelming majority of state legislatures. The key to the matter is equality of representation. There are many people who do not or who cannot vote, but they and their needs are nonetheless entitled to representation. Indeed, it does not appear that in Hawaii the "registered voters" measure was chosen on some supposition that the only basis of equality was that between voters; rather it was adopted under the conception that it furnished a usable benchmark of population.

2. But, in fact, the "registered voters" measure in Hawaii does not produce an apportionment substantially equivalent to that which a population measure would produce. The statistical proofs amply demonstrate this. Ten of the eighteen Representative Districts would have a different number of Representatives under a population measure from the number under a "registered voters" measure. More-

over, the "registered voters" measure discriminates against certain groups: against persons living in areas of low proportions of registration; against areas which have in the past received less representation than that to which they were entitled; against the poor and the areas in which they live; against the illiterate and the areas in which they live; against areas with a low median population age; against the military and the areas in which they live.—Indeed, the District Court appeared to uphold the "registered voters" measure in substantial part because it did exclude the military. However, the "registered voters" measure in Hawaii does not in fact even provide representation on a basis substantially equal to that of a "civilian population" measure. And, in any event, it is not constitutionally permissible to exclude military personnel as such from the representation measure.

3. The Hawaii constitutional provision in question does not simply set forth a system of apportionment which happens to have been based on a "registered voters" measure; it enshrines the "registered voters" measure in terms in the State Constitution, by requiring it to be used as the measure for periodic House reapportionment by the Governor. The District Court's affirmative declaration that this provision was constitutional would thus have been erroneous even if at the present time the "registered voters" measure happened to produce a result substantially equivalent to a population measure.

C. The District Court erred in sanctioning the multimember districting scheme used in the House of Representatives. While multimember districting schemes do not *per se* violate the Equal Protection Clause, *Fortson* v.

Dorsey, 379 U. S. 433 (1964), they must be scrutinized with particular care.

1. Here the keystone of the essential invalidity of the scheme is the complete arbitrariness of the construction of the Representative Districts, both in terms of boundaries and in terms of size. There is no rational pattern here justifying the existence of districts of varying sizes which in turn call for varying numbers of Representatives. And there was no reason for the complete arbitrariness of the multimember districting scheme; it was possible to draw single-member districts and to draw them on a basis in which—unlike the multimember districts—population figures from the federal census could be meaningfully used. This arbitrariness cannot be sustained in view of the severe consequences which it has for fair and equal representation.

2. The Hawaii multimember districting system results in overrepresenting the large multimember districts. A person in these districts has a number of Representatives responsive to him, whereas a person in a single-member district has but one. This, as a practical matter, is not counterbalanced by the numerically proportional increase in the size of the constituencies.

3. Moreover, the use of the multimember districting system in as diverse a society as Hawaii tends to submerge minority groups within the large multimember districts. In the light of the affirmative findings of the District Court as to the diversity of the population and the presence of minorities in the larger multimember districts, and of the absence of any rational basis for drawing those districts, the District Court should not have sanctioned the multimember districting system in the House.

D. The District Court erred in several respects concerning remedies. 1. It foreclosed, apparently as a matter of law, the possibility of provisional reapportionment by legislative action. This conflicts with the decision of this Court in *Maryland Committee* v. *Tawes, supra;* was apparently based on a misreading of a Hawaii Supreme Court decision; and is at the base of most of the court's other errors as to remedies. 2. The District Court also erred in ordering that a permanent reapportionment plan be put into effect before the 1966 general elections. In view of the possibility of a provisional plan, this stringent time table was not necessary for a permanent plan. 3. The District Court also improperly required that any permanent reapportionment amendment be initiated by constitutional convention rather than by the Legislature. There is no basis for the court's foreclosure of one of the two alternative methods provided in the Hawaii Constitution for proposal of constitutional amendments. 4. In any event, the District Court erred in not affirmatively requiring a proper apportionment at any such constitutional convention. 5. Finally, the District Court abused its discretion in imposing an injunction against legislation on the fifty-eighth day of a sixty-day legislative session, as a remedial device to bring about reapportionment.—While the effects of this action have been cancelled by the stay order issued out of this Court, it is unclear what the status of the injunction against legislation will be on remand, and this Court should make it clear that it would be an abuse of discretion to impose it under circumstances similar to those under which it was imposed in the 1965 session.

II. The District Court was correct in declining to approve the Legislature's proposed reapportionment plan for the Senate. In the first place, its action should be affirmed

on the alternative ground that the provisional Senate plan used the impermissible "registered voters" measure of representation. Moreover, the District Court was correct on the grounds on which it did act.

A. The provisional Senate plan's arbitrary construction of multimember districts violated the Equal Protection Clause. Indeed, the District Court found that the purpose of the construction of the Senate Districts was to protect the tenure of incumbent Senators—the same incumbent Senators who had voted for the measure. The court found no rational basis for the construction of the districts other than the use of the boundaries of the Representative Districts, which were completely arbitrary in themselves.

The effect of this arbitrary districting was clearly, as the District Court found, to submerge minorities within the large multimember districts and to give the majorities in those districts inordinate representational power vis-a-vis the rest of the State. Moreover, as the District Court also rightly found, the effect of the Senate plan was to intensify the inequities inherent in the House multimember districting plan. The cumulative effect of these inequalities, compounded by the arbitrariness of the districting, violated the Equal Protection Clause and the District Court was accordingly justified in rejecting the plan.

B. Even if these inequities in the Senate plan were thought not to amount to a violation of the Equal Protection Clause, the District Court's refusal to approve the Senate plan should nonetheless be sustained. Only the provisional plan was before the court. As permitted by its broad discretion to frame a remedy for the conceded malapportionment of the Senate, the District Court's order provided that any provisional plan adopted by the Legislature be

subject to its approval; and indeed the legislation enacting the provisional plan stated expressly that it was subject to the District Court's approval. Certainly in considering whether to approve or disapprove a provisional reapportionment plan, the District Court had a duty to scrutinize the plan to make sure that it negated the effects of the prior malapportionment and offered a sound basis on which a permanent reapportionment amendment might be adopted. Clearly, the infirmities found by the District Court, even if they are deemed not to be constitutionally dispositive, were sufficient to disqualify the provisional plan on this basis.

ARGUMENT

I. THE ERRORS OF THE DISTRICT COURT

In this part, we brief the Governor's appeal in No. 318 in which he contends that the District Court erred in a number of important respects in the orders under review.

Fundamentally, the District Court erred in affirmatively holding valid the remainder of the Hawaii Constitution's provisions for legislative apportionment, despite the fact that it had struck down the material provisions of the Senate apportionment. Even apart from this, however, certain features of the House apportionment—the extensive multimember districting and the use of registered voters as a measure of representation—were invalid, and the District Court's holdings to the contrary were erroneous. —Naturally, these two features—the use of multimember districts and the "registered voters" measure—may well recur in any future proposal to reapportion the Senate, underscoring the importance of a decision on them.

The District Court also erred in several matters going to remedies. It erroneously precluded interim provisional reapportionment by the Legislature, and improperly foreclosed one of the methods provided in the Hawaii Constitution for the initiation of constitutional amendments. Finally, if its injunction against legislation until a reapportionment plan is provided for has a continuing effect, it is too extreme a measure.

We will brief these points in turn in this Part I, before turning to the defense of the court's rejection of the April 1965 Senate reapportionment plan in Part II.

A. The District Court Erred in Affirmatively Holding That, Despite the Unconstitutional Provisions of Article III of the Hawaii Constitution Fixing the Number of Senators Per District, All Other Provisions of Article III Were "Constitutional and Valid."

In its opinion of February 17, 1965, the District Court undertook affirmatively to hold that, despite the unconstitutional provision of Article III, Section 2, fixing the number of Senators per Senatorial District, the other provisions of Article III were "constitutional and valid." (R. 79-80; 238 F. Supp., at 478-79) The court thus affirmatively held valid the provisions for apportionment of the House. Moreover, the court affirmatively upheld even the provisions of Section 2—relating to the Senate—which dealt with matters other than the apportionment of the number of Senators per Senatorial District. (R. 66-67 n. 4, 79; 238 F. Supp., at 472 n. 4, 478) Thus, it impliedly held constitutional the present Senatorial districting boundaries; and, indeed, it expressly upheld the provision fixing the membership of the Senate at twenty-five. In so doing the court erred.

1. The District Court affirmatively held that most of the provisions for legislative apportionment in Hawaii are "constitutional and valid" despite the unconstitutionality of the provision fixing the number of Senators per Senate District.—However, the issue before the court was whether the plaintiffs were denied the equal protection of the laws by being deprived of equal legislative representation. Necessarily, equality of representation depends on one's representation in the State's scheme of representation as a whole. As this Court stated in *Maryland Committee* v. *Tawes,* 377 U. S. 656, 673 (1964):

> ". . . in reviewing a state legislative apportionment case this Court must of necessity consider the challenged scheme as a whole in determining whether the particular State's apportionment plan, in its entirety, meets federal constitutional requisites. It is simply impossible to decide upon the validity of the apportionment of one house of a bicameral legislature in the abstract, without also evaluating the actual scheme of representation employed with respect to the other house. Rather, the proper, and indeed indispensable, subject for judicial focus in a legislative apportionment controversy is the overall representation accorded to the State's voters, in both houses of a bicameral state legislature."

In this case, however, the District Court first examined the Senate and found that it was unconstitutionally apportioned. It then evaluated the apportionment of the House of Representatives in a vacuum—without knowing what sort of Senate it would ultimately be coupled with—and affirmatively held the House apportionment to be constitutional.

This affirmative holding violated the dictate of this Court's opinion, just quoted, in the *Tawes* case. The District Court failed to realize the issue before it—the validity of an overall scheme of representation; it bifurcated the scheme, and treated the Hawaii Legislature as though it were the separate unicameral systems of two different states. Because the question before a court in a case challenging legislative apportionment is the validity of a system of representation, the invalidity of apportionment in one house invalidates the provisions concerning the second house. In the *Tawes* case, this Court said, "whether or not the House is apportioned on a population basis, the scheme of legislative representation in Maryland cannot be sustained under the Equal Protection Clause of the Federal Constitution, because of the gross disparities from population-based representation in the apportionment of seats in the Maryland senate." (377 U. S., at 673)[1] Therefore, not only must a court consider the validity of a bicameral system as a whole, but the remainder of the system cannot be declared valid if one material part of it is invalid.

The District Court's holding was based on its conclusion that there was no evidence that the provisions concerning the apportionment of the House of Representatives were inseverable *in fact* from those concerning the number of

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[1] To the same effect is *Lucas* v. *Forty-Fourth General Assembly*, 377 U. S. 713, 734-35 (1964). The lower court had assumed—and the parties had apparently agreed—that the apportionment of the Colorado House as set forth in a proposed apportionment plan was valid on the basis of population; this Court, finding the proposal for the Senate invalid, struck down the entire plan. Similar findings of inseverability were made by the district court, *Lucas* v. *Forty-Fourth General Assembly*, 232 F. Supp. 797, 799 (D. Colo. 1964), and recently by the Supreme Court of Colorado. *In re House of Representatives*, 400 P. 2d 931 (1965).

See also *Davis* v. *Synhorst*, 225 F. Supp. 689 (S. D. Iowa 1964), *aff'd sub nom. Hill* v. *Davis*, 378 U. S. 565 (1964).

Senators to be allocated to each district. This approach was erroneous as a matter of law; and the conclusion the court drew was erroneous as a matter of fact, as we will develop.

2. The provisions of Article III for the apportionment of the Senate and of the House are interdependent as a matter of fact. The interrelationship of the provisions of Article III is obvious from the face of the Article and from its legislative history.

(a) Indeed, the adoption of the bicameral form itself indicates this interdependence. Traditionally, the bicameral form has been used to create a set of checks and balances within the legislative branch of the government. "A prime reason for bicameralism, modernly considered, is to insure mature and deliberate consideration of, and to prevent precipitate action on, proposed legislative measures." *Reynolds* v. *Sims,* 377 U. S. 533, 576 (1964). In order to attain these ends, the two houses have usually been structured differently—in number of members, number of constituents per member, and composition and geographical distribution of districts—in order to assure the full expression and representation of the views of the people. The structure of one is thus tied to the structure of the other.

It would be extravagant to assume that either house of a bicameral legislature was intended to stand without the other. A recent state case puts this matter clearly. In *Jackman* v. *Bodine,* 43 N. J. 453, 205 A. 2d 713 (1964), the Supreme Court of New Jersey, finding that the Senate apportionment provisions of the State Constitution were on their face unconstitutional, thereupon concluded that the court need not consider the validity of the lower house. "The reason is that a court cannot fairly assume the

people would have intended the one house to survive as the lone repository of the legislative power." 43 N. J., at 461; 205 A. 2d, at 717.[2]—But obviously, unless it is able to make that assumption, a court cannot affirmatively sanction the constitutionality of one legislative chamber's apportionment after declaring the other's unconstitutional.

(b) The detailed provisions and their history confirm this interrelationship between the structures of the chambers of the Hawaii Legislature. Sections 2, 3 and 4 of Article III deal with the structure of the two houses. From a cursory reading of those sections it is obvious that the Hawaii House and Senate differ in size, the Senate being approximately one-half the size of the House;[3] that the Senate has fixed districts from which a fixed number of Senators is elected, while the House has districts which may be altered in certain circumstances and from which differing numbers of members are elected according to the number of registered voters within them as established every ten years;[4] and that the Senate districts are generally much larger in geographical area than the House districts. Only the Sixth Senatorial District and the Eighteenth Representative District (Kauai) are the same in all respects. It is reasonable to presume from this system that each chamber was intended to reflect different views and to complement the other. The District Court found that the Senate was intended to represent predominantly rural views while the House was to

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[2] Similar results were reached in *Davis* v. *Cameron*, 238 F. Supp. 462, 465 (S. D. Iowa 1965); and *Stout* v. *Bottorff*, Civil No. IP-61-C-236, U. S. D. C., D. Ind., February 27, 1965.

See generally *Williams* v. *Standard Oil Co.*, 278 U. S. 235, 241 (1929).

[3] The House has 51 members, the Senate 25. Article III, §§ 2, 3.

[4] Art. III, §§ 2, 4.

represent the urban views of the City and County of Honolulu. (R. 64-66; 238 F. Supp., at 471)

The Constitutional Convention of Hawaii considered that the apportionment of one house was the inducement and compensation for the apportionment of the other—a Senate based on geographical representation, giving a controlling majority to the counties of Hawaii, Maui and Kauai; and a House of Representatives based on registered voters, giving a controlling majority to the City and County of Honolulu. As stated by Delegate Cable A. Wirtz, a member of the constitutional convention, in the course of the convention debates:

> "The consensus, as I gather, of this Convention and of the Legislative Committee is that we should have two bases of representation in a bicameral legislature, one of the houses to be on the basis of population as indicated by means of registered votes; the other to be on the basis of a combination of geographical and political subdivisions, more or less patterned after our present existing Senate, keeping insofar as possible the same ratio and proportion. Now the idea of having the two bases of reapportionment is to provide a truly bicameral legislature with balances and checks. The Senate is designed so that no county, no one county or no one senatorial district has control over that house; whereas, based upon population, obviously, in the House of Representatives the control will be at present in the County of Oahu." (Governor's Ex. GO-2, R. 408)

This interrelationship is also indicated in the report of the convention's Committee on Legislative Powers and Functions:

> "[Y]our committee has agreed that the house of representatives must be apportioned on the basis of the number of registered voters among the several major island divisions (the present counties) but that the present ratio of representation among the four existing senatorial districts should be maintained in the senate." (Plaintiffs' Ex. 11, R. 343-44)

When the District Court rightly held that the Senate half of that "package" could not be squared with the Federal Constitution, it should have invalidated the whole apportionment package.

(c) There are also structural similarities between the systems for the two chambers which illustrate their interdependence. For example, the districting of the House depends on the districting of the Senate. The "basic areas" of the State—Hawaii, Maui, Oahu, and Kauai—are significant in the districting and apportionment of each house. No district crosses the boundaries of these basic areas. Each basic area is composed of one or two Senatorial Districts. The District Court found that the Senators are apportioned among the "basic areas" on the basis of geography. The members of the House are initially apportioned among these basic areas according to their registered voters and then distributed among the districts of each area.

Moreover, no Representative District is divided between two or more Senate Districts. Each Senatorial District is composed of one to four complete Representative Districts. Thus, the boundaries of all Senate Districts also constitute boundaries of Representative Districts, confirming that the districting of each house depends upon that of the other.

The interdependence of the boundaries is underscored by the provision of Section 4 that, while the Governor may reapportion the House, he may do so only by reallocating the number of representatives and not by redrawing district lines, except in one limited circumstance. The purpose of the constitutional draftsmen in creating a scheme in which the districting of one house was substantially dependent on that of the other was undoubtedly in large part to insure that the Senate Districts would be larger geographically and in number of constituents than the House Districts.

Also, both houses rely predominantly on multimember rather than single-member districts. All of the Senate Districts elect from two to five members. In the House, as originally apportioned and as reapportioned in 1959, thirteen of the eighteen districts elect more than one Representative.

(d) The interrelationship of the provisions of Article III is not confined to the relationship of the apportionment schemes of the two houses, but extends to many other material provisions of the Article. Two striking examples can be given.

In the first place, the provision of Article III that the Senate be composed of twenty-five members—which the District Court affirmatively sanctioned—is interrelated with the invalid geographical basis of apportionment in the Senate. The legislative history makes it plain that a Senate of this size was arrived at by extrapolating from the number of Senators to be allowed Oahu. (R. 346) But if that extrapolation had been done on a population basis, the size of the Senate would have been much smaller.—As we will develop below (pp. 39-40; 98-104), much of the difficulty later found in devising an appropriate plan for the Senate

arose from the freezing of the Senate at twenty-five members in effect ordered by the Court.

Secondly, the measure of representation is a material, inseverable element of the overall scheme. By affirmatively sanctioning the House apportionment scheme—with its use of registered voters as a representation measure, and its scheme of decennial reapportionment the year *before* the federal census, which prevents the effective use of any other representation measure—the Court committed the Senate reapportionment to the same measure. The use of two separate measures, one for each chamber, would be highly unlikely. As we shall develop below, pp. 42-70, there are independent reasons why this approach is impermissible in either house. However, even if it were a matter of discretion, there was no reason for freezing the choice of measures to be followed in the Senate.—But the court's action in affirmatively sanctioning the House apportionment and measure did just that.[5]

3. The District Court's error in departing from *Tawes* and affirmatively upholding the remaining provisions of Article III has more than academic consequences. It already has grossly embarrassed orderly reapportionment in Hawaii. It may be expected to do so further unless corrected.

(a) The ineffectual efforts at Senate apportionment essayed by the Hawaii Legislature in March and April 1965 are the primary object lesson. Section 1 of Article III expressly provides for a bicameral legislature. The geo-

[5] Indeed, the court's March order permitting the Legislature to propose a plan for the reapportionment of the Senate affirmatively mandated that the reapportionment be made on the basis of registered voters. (R. 89) This action appears to compound the errors committed by the District Court in freezing the alternatives that were before the Legislature.

graphically-structured, rural-oriented Senate envisioned by Article III to complement Article III's House of Representatives had been held unconstitutional. However, the House plan had been affirmatively upheld. Because the House plan was a valid part of the Hawaii Constitution, it could be amended only according to the provisions of Article XV of the Constitution relating to constitutional amendment.[6] Therefore, the Legislature, which was given the occasion in March 1965 by the court to propose a new Senate plan, was precluded from altering the apportionment of the House[7] and yet was required to create a rational

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[6] As we shall develop, the District Court on other occasions erroneously held that even the invalid provisions of Article III could be changed only by constitutional amendment. Its March orders, looking toward reapportionment of the Senate by legislation, correctly but inconsistently held otherwise.

[7] The following questions to and answers by the Chairman of the Conference Committee which approved the proposed Senate plan are of interest:

"Judge Pence: Were there any suggestions that perhaps the proposed constitutional amendment should provide for a complete redistricting of the House to make the House single member district [*sic*]? Was that ever discussed?

"The Witness: That was never discussed." (R. 297)

"Judge Jertberg: To what extent is the thinking, at least of the Senate Conferees, influenced by the fact that there were multiple representatives in the lower House?

"The Witness: I can't answer that, your Honor, because that problem was never discussed." (R. 298)

"Q. And you mentioned in your direct testimony, Senator, —and is it correct?—that the conferees did not consider the composition or possibility of a constitutional amendment to reapportion and to redistrict the House of Representatives at the same time as that of the Senate?

"A. No, because the conferees were not given the task of dividing [*sic*] the particular question." (R. 310)

"Judge Beeks: Was it discussed at all, Senator, in connection with your approval of this bill, if the House of Representatives should be redistricted?

"The Witness: If there was any discussion, I think the feeling was that the House districting plan would be left alone. The Court found it valid and has [that was?] the extent in the report in which it was discussed." (R. 310-11)

bicameral system of representation. Because of the interdependence of the provisions of Article III, illustrated above, this narrowing of the area within which any reapportionment plan could operate necessarily made the Legislature's task almost impossible, as the results amply proved. —Indeed. the Senate plan led one member of the court below to declare of the February decision sanctioning the House apportionment: "I am beginning to have great doubts as to whether we were right in the first place." (R. 311)

We will argue in subpart C below that the use of multimember districts in the House is unconstitutional in itself, and in part II below, that the proposal for the use of multimember districts in the Senate was properly held to be unconstitutional. But considerations of constitutionality aside, the effect of the error of the District Court in affirmatively sanctioning the remainder of Article III is plain: it produced the obviously undesirable Senate plans of March and April 1965 with their multimember districting run riot.

The multimember districting of the Senate was originally necessitated by the small number of Senate Districts created—six; and by the large number of members of the Senate—twenty-five. The District Court's February order impliedly held constitutional the provisions as to districts by holding that the provisions of Article III, Section 2, which did not relate to fixing the number of Senators per district were constitutional. (R. 79; 238 F. Supp., at 478) And the District Court then expressly held that the provision for twenty-five Senators was constitutional. (R. 66-67 n. 4; 238 F. Supp., at 472 n. 4)

When the Legislature in March initially attempted to reapportion the Senate, it merely reallocated the twenty-

five Senators among the existing six districts. This resulted in the allocation of nine Senators to the Fourth District in Oahu and ten to the Fifth District—the remainder of Oahu. Thus, seventy-six per cent of the Senators were to come from two enormous multimember districts in Oahu. This plan was abandoned after the District Court informally advised the parties that such lopsided districting would be unacceptable. The plan eventually submitted to the court in April provided for some redistricting of the Senate districts on Oahu, but it preserved the approach of having twenty-five Senators, as upheld by the court. The result was five Oahu Senatorial Districts with an average of 3.8 senators each. This is a vivid illustration of the dangers of presuming that the various details of the original apportionment plan even for a single house—here the Senate—are severable.

Moreover, the District Court's refusal to hold that the House plan was inseverable from the Senate also had an obvious, material effect on the multimember districting of the Senate set forth in the April plan. The District Court upheld the present boundaries of, and number of Representatives from, the House Districts. The House Districts were, in general, multimember. (See p. 10, *supra*) The Legislature, in reapportioning the Senate, understandably wished to create Senate Districts that were larger than House Districts. (R. 123-24; 134-35; 296-97) Any other approach would have made dubious the value of bicameralism. In order to do so on the basis of "equal proportions," as required by the court, and at the same time retain the present number of Senators, the inevitable result was the large, multimember districts, particularly on Oahu.[8]

[8] Indeed, the District Court's April opinion shows its first realization of the consequences of what it had done in affirmatively

(b) The court's action, then, has the positive legal effect of making it impossible for the Legislature provisionally to reapportion both houses by statute—and thus, practically, of making it impossible to reach a rational bicameral system. It will have the same effect on any attempt to reapportion judicially.—Moreover, it will, as a practical matter, embarrass any attempt at permanent reapportionment through constitutional amendment. The practical effect of an affirmative declaration of constitutionality must inevitably be to remove from reconsideration the apportionment of the chamber whose organization is affirmatively upheld.[9]

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sanctioning the constitutionality of the apportionment in the House. In rejecting the provisional Senate plan, the court pointedly observed:

> "In reapportioning and redistricting the senate, both houses overlooked the fact that, to be valid, the makeup of the senate must positively complement the makeup of the house, to provide the vital equality of voter representation. Both houses of the legislature seemingly forgot that the schemes of districting *each* house, when conjoined, must offer compensating advantages to the voters—not only to those voters within each representative district, be it senate or house, but to all voters throughout the State." (R. 159; 240 F. Supp., at 729)

Obviously, the proper course for the court to have followed, instead of regretting what the Legislature had done after the fact, would have been to have followed this Court's teaching in *Tawes* in the first place, and to have refrained from sanctioning the validity of any part of the overall scheme of legislative apportionment.

[9] To be sure, the court's order states that any constitutional convention "may also wish to reconsider the question" of the use of registered voters as a representation measure, the use of multi-member versus single-member districts, the practice of reapportionment immediately before the federal census—instead of the more appropriate time (if population is the guide) of immediately thereafter, and the alteration of the boundaries of the various legislative districts so that census data could be meaningfully used. (R. 78-79; 238 F. Supp., at 478) What value a simple exhortation of this nature will have in view of the District Court's affirmative

This is because of the forces of political inertia—which in the long years before this Court's decision in *Baker* v. *Carr*, 369 U. S. 186 (1962), acted as a brake on all state legislative reapportionment[10]—and because of the understandable tendency of incumbent legislators to protect their positions.—While this latter factor would obviously be the case in any provision for a constitutional amendment initiated by the Legislature, it would be unrealistic to assume that it would not also be a factor in a reapportionment initiated by a constitutional convention.

If as a practical matter, the apportionment of the House or the other details of the present scheme, apart from the number of Senators per Senatorial District, is removed from consideration, the number of variables which can be adjusted to reach a sound overall bicameral plan shrinks, and reaching that plan becomes more difficult.

Thus, practical considerations join with the clear teachings of this Court in establishing the error of the action of the District Court.

B. The District Court Erred in Sanctioning the "Registered Voters" Measure of Representation in Hawaii.

Not only did the District Court err in affirmatively declaring the Hawaii House of Representatives to be "constitutional and valid" in its apportionment; it also erred in not affirmatively declaring its apportionment unconstitutional. —The first basis on which we make this contention is as to the Hawaii Constitution's use of the "registered voters" measure of representation in the House.

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sanction of the "registered voters" measure, of the House multimember districting, of reapportionment immediately before the federal census, and of a system of districting which is not coordinated with census districts, is highly conjectural.

[10] See Lewis, *Legislative Apportionment and the Federal Courts*, 71 Harv. L. Rev. 1057, 1060-66, 1096-97 (1958).

In its February decision holding the House of Representatives of Hawaii to be constitutionally apportioned, the court considered the "registered voters" measure of representation of the House. It held that that measure "did in fact . . . result in apportionment 'substantially on a population basis'" in 1959 and was not "part of any invidious scheme to disenfranchise any person or group, or to dilute the vote of any person."[1] (R. 68, 77; 238 F. Supp., at 473, 477) But the use of registered voters is neither a permissible measure of representation in itself, nor as a matter of fact here does it produce an apportionment substantially equivalent to that which would be produced under a permissible method.

1. *A Legislative Apportionment System May Not Be Based on the "Registered Voters" Measure.*

In seeking to demonstrate a correlation between registered voters and population in Hawaii, the District Court in this case apparently recognized that an apportionment scheme cannot deviate substantially from the principle that equal numbers of persons must be represented equally. (R. 68; 238 F. Supp., at 473) A "registered voters" measure cannot be upheld in itself; and its product may be upheld only if it happens to be an adequate reflection of total popuation—and only as long as it is.

(a) In *Reynolds* v. *Sims*, 377 U. S. 533, 567-68 (1964), this Court stated:

> "Population is, of necessity, the starting point for consideration and the controlling criterion for judgment

[1] Subsequently, in permitting the presentation of a legislative Senate reapportionment plan, the court affirmatively required that any Senate plan be apportioned on the basis of registered voters in the 1964 election. (R. 89)

in legislative apportionment controversies. . . . This is at the heart of Lincoln's vision of 'government of the people, by the people, [and] for the people.' The Equal Protection Clause demands no less than substantially equal state legislative representation for all citizens, of all places as well as of all races.

"We hold that, as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis.

"By holding that as a federal constitutional requisite both houses of a state legislature must be apportioned on a population basis, we mean that the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable." *Id.*, at 577.[2]

Clearly, this language of the Court in *Reynolds* v. *Sims* to the effect that "population" is the measure of representation, and the opinion's references to the "equal-population principle" (*id.*, at 579), must be taken as meaning what they say. It is the Equal Protection Clause which, this Court's decisions hold, guarantees the right of equal representation. The Equal Protection Clause, in terms, is a guarantee that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." On its face, the Clause guarantees its protections to all the population of a state; and we contend that there is no rational basis, con-

[2] This Court has consistently indicated that an apportionment scheme must be based substantially on population. See *WMCA, Inc.* v. *Lomenzo*, 377 U. S. 633 (1964); *Maryland Committee* v. *Tawes*, 377 U. S. 656 (1964); *Davis* v. *Mann*, 377 U. S. 678 (1964); *Roman* v. *Sincock*, 377 U. S. 695 (1964); *Lucas* v. *Forty-Fourth General Assembly*, 377 U. S. 713 (1964).

sistent with the Clause, for drawing a distinction in terms of the right to representation between those persons who have registered to vote, and those who have not registered or who cannot register.

The right to representation is one inherent in all the people; it is not dependent on the right to vote; much less is it dependent on the exercise of the right to vote through registration or actual voting. To be sure, for purposes of standing to bring a suit to vindicate the right of equal representation, it may be necessary for the particular plaintiff to be a registered voter; historically, standing has been found through analogy to the right to have one's vote fairly counted. See *Baker* v. *Carr*, 369 U. S. 186 (1962).

But the fact that justiciability in these matters has been recognized by analogy to protection of the right to vote does not answer the question, what is the proper measure of a voter's voting power—whether it is to be measured in terms of the relative populations of the relevant voting districts or in terms of their relative number of registered voters.--Indeed, if the point of the application of the Equal Protection Clause in this area was that it guaranteed equality of strength among voters, an apportionment based on population would be constitutionally suspect, unless population happened to coincide with the number of voters on the rolls.[3] But a holding that population was not *per se*

[3] In *Sincock* v. *Duffy*, 215 F. Supp. 169 (D. Del. 1963), *aff'd sub nom. Roman* v. *Sincock*, 377 U. S. 695 (1964), the District Court held that the apportionment schemes of both houses of the Delaware legislature were unconstitutional because they were not based on equality of inhabitants per representative. In justifying its use of federal census total population figures for this measurement, the court said, "We take judicial notice of the fact that in the State of Delaware, as in the other states of the United States, there is a direct and reliable relationship between the number of inhabitants in an area and the number of electors therein and that the ratio

a permissible apportionment measure would have staggering implications, and would fly in the face of this Court's decisions.

As we have suggested, this Court's decisions indicate that the constitutional right to fair apportionment is to be measured on a population basis;[4] and this measure has histori-

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of electors to inhabitants is relatively stable." 215 F. Supp., at 175-76. This statement was dictum, and the Supreme Court on appeal did not mention it. This Court was not required to do so, because the District Court properly ascertained the unconstitutionality of the apportionment schemes on the basis of total population; it used the right figures, although for the wrong reason. As is developed below, the District Court was wrong in both its assumptions: (1) that the proper basis of apportionment is number of electors, and (2) that there is necessarily a significant correlation between distribution of inhabitants within a state and distribution of electors.

[4] Even though this Court has often spoken in terms of equality of voting power, in every opinion but one it has dealt with population, as reported by the census figures, in determining that equality. The only exception is *WMCA, Inc.* v. *Lomenzo,* 377 U. S. 633 (1964), No. 85, O. T. 1965 (decided October 11, 1965), *affirming* 238 F. Supp. 916 (S. D. N. Y. 1965). There a representation measure which was based on total population, excluding only aliens, was upheld. The District Court had found that exclusion or inclusion of aliens would make no substantial impact on apportionment. 238 F. Supp., at 925. It might well be argued that the exclusion of aliens from representation was a permissible categorization under the Equal Protection Clause. But in any event, the question whether it is always permissible to exclude aliens from the apportionment measure is, of course, not presented here. In this case, the State has deviated much further from overall population, by excluding all who are not registered voters from the measure of representation.

Of the six leading legislative apportionment cases decided in June 1964, all of the apportionment schemes except that in *Lomenzo* were judged by the Court according to census figures on population. Indeed, in *Davis* v. *Mann,* 377 U. S. 678 (1964), the Court held that it was impermissible to discriminate against certain populous areas of the state on the basis that they contained large numbers of military and military-related personnel. It is notorious that registration in the state in which they are stationed is low among the military. See pp. 65-67, *infra.*

cally been the standard in the Federal House of Representatives and in the vast majority of the states, except where unconstitutional methods such as those condemned in *Reynolds* v. *Sims* and its companion cases have prevailed.

The key to the matter is representation. Voting is merely one of a number of ways in which the citizen's right to be represented is manifested. It is merely the right to choose the individual who shall represent the citizens in the legislature. However, the right to representation is a broader right of effective participation in, and relationship to, the legislative process. It includes the right to petition the legislature, the right to bring one's needs to the attention of a particular legislator who has been elected from the citizen's legislative district, and the right to be weighted in the composition of the legislature. Voting is only one way that a citizen may make a political impact on the lawmakers; the right of representation includes all ways of bringing political beliefs or needs to bear in the legislature, including the most elemental one of being one of the factors on which legislators—responsive to their individual constituents' needs—are apportioned among districts.

This Court in *Reynolds* v. *Sims*, 377 U. S. 533, 565 (1964), stressed that the essential right to be protected was one of representation: "[R]epresentative government is in essence self-government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies."

It is this right to equal representation which must be guaranteed by a legislative apportionment scheme. "[T]he achieving of fair and effective representation for all citizens

is concededly the basic aim of legislative apportionment ...." 377 U. S., at 565-66.[5]

The number of persons entitled to representation and the number entitled to vote necessarily differ in our society because of governmental limitations placed on the right to vote to guarantee mature and informed judgment by the electorate and to maintain effective administrative control over elections. However, those who may not vote are still entitled to representation. For instance, in Hawaii all persons, whether or not qualified or registered to vote, are subject to taxes imposed by the Legislature. Because of the strongly centralized state government in Hawaii, the Legislature controls the school system throughout the State. Schools are attended, at all but the highest levels, by those who are not registered voters. Most other public services are "consumed" by those who may or may not be registered voters.

The distribution throughout a state of registered or qualified voters and of the general population may not necessarily correlate. If they do not, equality of representation is denied to those areas with a low registration rate or a low proportion of persons entitled to vote. The larger an area's population, the greater its need for governmental services is apt to be; and other things being equal, the larger its tax burden. If apportionment of legislators is not consistent with the proportion of total population in an area, because of the use of a "registered voters" measure, it is clear that the more populous areas, if compara-

[5] In *Baker* v. *Carr*, 399 U. S. 186 (1962), it was unclear what measure of representation the plaintiffs were contending for. See 369 U. S., at 189-90 n. 4. However, the Court made it clear in *Reynolds* v. *Sims*, *supra*, 377 U. S., at 556, that: "We intimated no view [in *Baker*] as to the proper constitutional standards for evaluating the validity of a state legislative apportionment scheme."

tively low in registered voters, are not likely to receive public services in proportion to their needs or in proportion to their tax burdens. A patent inequality of representation would therefore exist.

(b) Indeed, the traditional way in which equality of representation had been guaranteed in this country has been to apportion representatives according to total population. The prime example is the apportionment of the Federal House of Representatives. The members of the House are apportioned among the several states according to the number of inhabitants of each state. U. S. Const. Art. I, § 2; Amend. XIV, § 2. Moreover, congressional districts within a state must include substantially equal numbers of inhabitants. *Wesberry* v. *Sanders,* 376 U. S. 1 (1964). "The history of the Constitution, particularly that part of it relating to the adoption of Art. I, § 2, reveals that those who framed the Constitution meant that, no matter what the mechanics of an election, . . . it was population which was to be the basis of the House of Representatives." *Id.,* at 8. There is "no excuse for ignoring our Constitution's plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives." *Id.,* at 18. This Court held that, if representation was not based on inhabitants, equality of voting power was denied to some voters; however, it is obvious that the Court assumed that voting power was equal only if the representatives represented equal proportions of the total population:

> "The debates at the Convention make at least one fact abundantly clear: that when the delegates agreed that the House should represent 'people' they intended that in allocating Congressmen the number assigned to each State should be determined solely by the number

> of the State's inhabitants. The Constitution embodied Edmund Randolph's proposal for a periodic census to ensure 'fair representation of the people,' an idea endorsed by Mason as assuring that 'numbers of inhabitants' should always be the measure of representation in the House of Representatives. The Convention also overwhelmingly agreed to a resolution offered by Randolph to base future apportionment squarely on numbers . . . ." 376 U. S., at 13-14.[6]

Indeed, it does not appear that more than eight states follow a "registered voters" or "qualified voters" measure of apportionment.[7] And even in those states, the choice of

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[6] To be sure, in *Reynolds* v. *Sims, supra,* this Court indicated that analogies between state and federal legislative schemes are not always valid. "Nevertheless, *Wesberry* clearly established that the fundamental principle of representative government in this country is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a State." 377 U. S., at 560-61. To guarantee this equality of representation, population must be the measure, and registered voters cannot stand as a measure except to the extent it happens to produce substantially the same result.

Indeed, *Reynolds* v. *Sims* relied heavily on the *Wesberry* case. *Wesberry* drew on the theory of equal representation through apportionment on the basis of total population established by the framers of Article I of the Federal Constitution. From this theory the Court derived its doctrine of "one man, one vote," which it applied in *Reynolds* to state apportionment cases. Although the House of Representatives scheme may not be a mandatory plan for all state legislatures, "a careful reading of *Reynolds* v. *Sims,* and particularly its analysis of the foundation for the 'one person one vote' concept, makes clear that the basic constitutional protection is one of equal representation by population, and not equal representation by registered voters." *Ellis* v. *Mayor of Baltimore,* 234 F. Supp. 945, 953 (D. Md. 1964), *aff'd,* 34 U. S. L. Wk. 2215, 4th Cir., October 11, 1965.

[7] Arizona, Ariz. Const., Art. IV; Hawaii; Idaho, Ida. Const., Art. III; Massachusetts, Mass. Const., Amend. LXXI; Rhode Island, R. I. Const., Art. XIII, Amend. XIX; Tennessee, Tenn. Const., Art. II; Texas, Tex. Const., Art. III; Vermont, Vt. Const., Art. II.

the "registered voters" or "eligible voters" measure generally appears not to have been one designed to reach a measure permissible in itself, but a choice made simply as an effort to gauge the total population. Indeed, the proceedings of the Hawaii constitutional convention demonstrate that the "registered voters" measure was chosen there precisely for this reason—that it was thought accurately to reflect total population, not because it was thought to be a justifiable measure in itself. In the convention it was stated:[8]

> "The idea among other things was to make the districts as nearly equal population-wise as possible . . . ." (Proceedings, p. 107)

> "One of the reasons why the reapportionment directed by the Organic Act was not carried out was because that Act required reapportionment on the basis of citizen population. A breakdown of the population according to this standard has not been locally available. Total population figures for the Territory are shown by census tracts which do not necessarily coincide with locally defined areas. *As a practical matter, the number of registered voters was found to bear a reliable and fairly uniform relationship to total population, although it favors slightly the neighbor islands where the percentage of persons who have registered to vote is from one to two per cent higher than for Oahu.* It was in recognition of the potential difficulty in obtaining figures which would show citizen population or figures which would show total population by desirable districts, that the basis for reapportionment of the members of the House was chosen as the number of registered voters." (R. 347-48) (Emphasis supplied)

[8] As we will demonstrate in point 2 of this subpart, in Hawaii the use of the "registered voters" measure does not, in fact, result in equal representation on a population basis.

2. *The Hawaii "Registered Voters" Measure Does Not in Fact, Produce a Constitutionally Permissible Apportionment.*

The District Court apparently concluded that the "registered voters" measure used in apportioning the Hawaii House of Representatives results in representation similar to that which would be obtained if population—or at least civilian population—were the measure. (R. 68-77; 238 F. Supp., at 472-77) It also concluded that the use of the "registered voters" measure did not invidiously discriminate against any class of persons in the population. (R. 77; 238 F. Supp., at 477) We shall show that the Hawaii "registered voters" measure does not produce an apportionment substantially equivalent to a general population measure—as indeed the District Court appeared to concede—in seeking to equate the effect of the "registered voters" measure simply with that of a "civilian population" measure. We shall also show that use of the "registered voters" measure does in fact result in invidious discrimination, and that in fact it does not even substantially accord with a "civilian population" measure, although we contend that that measure is not itself justifiable under the Equal Protection Clause.

(a) *Use of a population measure would result in a greatly different apportionment for the Legislature than the "registered voters" measure.*[9]—The disparity between the appor-

[9] The only justification for the use of "registered voters" given by the constitutional convention was its supposed substantial equivalency to a population measure. We refute this justification at this point. Other possible justifications are taken up below, pp. 64-70, *infra*. This Court has said that "So long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal-population principle are constitutionally permissible. . . . " *Reynolds* v. *Sims*, 377 U. S. 533, 579 (1964). In the present case, all possible reasons for the use of a "registered voters" measure involve invidious discriminations or false presumptions.

tionment that would be produced in the Hawaii House through a population measure and through a "registered voters" measure is graphically illustrated by Plaintiffs' Exhibit 1. (R. 339) This table also illustrates the disparities that would be created between a reapportioned Senate (using the old Senatorial Districts) in terms of the population measure versus the "registered voters" measure. The table uses, as a basis of comparison, the population and registered voter count in 1960, the last year in which there was a federal census.[10] The table indicates that ten of the eighteen Representative Districts would have a different number of Representatives under a population measure from that under a "registered voters" measure.

In the case of two districts, the disparity is gross: that is, the difference in number of Representatives is more than one. Thus, in the Tenth Representative District, a population measure would yield eight Representatives, while a "registered voters" measure yields four. And in the Elev-

[10] As a threshold matter, the District Court erred in holding (R. 68; 238 F. Supp., at 472) that these figures were not apposite because the present House reapportionment occurred in 1959, on the basis of 1958 registered voters, at which time the 1950 census was the last available. The court suggested that the discrepancy between total population and registered voters must be shown as of 1950 or 1958, presumably through false analogy to the proposition that reapportionment need not occur more often than once every ten years. But as we have already suggested (p. 37, *supra*), the Hawaii Constitution's provision for reapportionment immediately before the federal census is part and parcel of its approach of using "registered voters." The District Court's argument, accordingly, appears to be a bootstrap one. Clearly in passing on the validity of a reapportionment which occurred in 1959, and before affirmatively sanctioning the "registered voters" measure on a prospective basis, the District Court should have compared the population figures for 1960 either with the 1958 registration figures which were the basis of the 1959 reapportionment, or at least should have compared the 1960 "registered voters" figures with the 1960 census figures, as we will henceforth do in the text for purposes of comparability.

enth Representative District, a population measure would yield five representatives, while the "registered voters" measure yields three.

To put the matter a different way, if the House were apportioned on the basis of 1960 registered voters, a Representative District, the Tenth in Oahu, with a 1960 population of 95,118, would be entitled to the same number of Representatives as the Fourteenth District with a population in 1960 of 42,476, as the Sixteenth with a 1960 population of 42,~~476~~ 756, and as the Seventeenth with a 1960 population of 36,956. Therefore, the Seventeeenth District, with less than forty percent of the population of the Tenth District, would be entitled to an equal number of representatives.

These disparities are confirmed by a table showing average representation *per capita* in the House. (Governor's Ex. GO-1, R. 407) Representation ranged in 1960 from one Representative per 5,030 persons to one Representative per 23,779 persons. In six of the eighteen districts, one Representative represented less than 9,000 persons. In four of the districts one Representative represented more than 17,000 persons.

It is also of interest to observe the inequities that would be caused by application of the "registered voters" measure to the larger districts which will presumably be adopted in reapportioning the Senate.—Of course, unless use of the "registered voters" measure in the House is held unconstitutional, it presumably will be followed in the Senate as well.[11] It would appear most unlikely that different measures of representation would be used in the two houses.

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[11] Indeed, at one point the District Court ordered it followed in the Senate. (R. 89)

Plaintiffs' Exhibit 1, R. 339, indicates—using the old Senate Districts—that even greater disparities are produced as between the "registered voters" measure and the population measure in the larger Senate Districts.[12] In four of the six Senatorial Districts, a different number of Senators results depending on the measure used, and in two of these four the disparity is gross, that is, by more than one Senator. Thus, in the Fourth District, the use of population yields seven Senators, the use of "registered voters" nine; in the Fifth Senatorial District, the use of population would yield thirteen Senators, and the use of "registered voters" nine.—Thus the use of "registered voters" would give each district the same number of Senators, although the Fifth District had a 1960 population of 318,102, while the Fourth District had a population of 182,307. Yet, to "give the same number of representatives to unequal numbers of constituents" is to deny the equal protection of the laws. *Reynolds* v. *Sims, supra,* 377 U. S., at 563.

To put the disparity in percentage terms: The proportion of the population which is registered varies among the House Districts. For instance, as to population in 1960, the Ninth District had 17.3% registered voters, while the Fifth District had 48% registered voters. Among the previous Senate Districts the percentage varied from 23% in the Fifth District to 43.5% in the First District. (R. 362)

Such substantial deviations from the basis of population vitiate the House apportionment as a permissible approximation of population.[13]

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[12] This demonstration shows that the disparity between the results under the two measures is not readily correctible by using larger districts.

[13] In *Ellis* v. *Mayor of Baltimore,* 234 F. Supp. 945 (D. Md. 1964), the District Court held that "Consideration of registered voters [as a basis for apportionment of a city council] is not im-

(b) *The "registered voters" measure discriminates invidiously against certain groups.*—In general, and particularly in the context of Hawaii, the use of the "registered voters" measure underrepresents certain groups of the population. We will review these groups one by one.

(i) Persons living in areas of low proportions of registration.

Under the Hawaii measure, by definition the person who is eligible to vote but unregistered obtains less representation for the whole of the ten-year period between reapportionments than does the registered voter. It must also, however, be remembered that even the registered voters in his geographical area are afforded reduced representation solely because they live near the person who is eligible to vote but unregistered.

While it may be reasonable, in the light of administrative considerations, to condition the right to vote on registration during a period preceding an election,[14] it surely is not reasonable to diminish a man's vote for a ten-year period because he was not registered at a particular point of time.

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proper if a valid result based upon population is reached, but encouragement of voter registration, although a worthy political and social objective, is not sufficient to support a weighting of votes in the ratio of 1.66 to 1, where the percentage of registration to population is approximately 36% in the first councilmanic district and approximately 33% in the second." 234 F. Supp., at 958. As the Court of Appeals stated in affirming the District Court's disapproval of the "registered voters" measure: "This is no insignificant departure from the criterion of population made mandatory by the Constitution as interpreted by the Supreme Court." 34 U. S. L. Wk. 2215 (4th Cir., October 11, 1965). The Court of Appeals found that 30% of the total population in one district was registered, while 51% of the population of another district was registered.

[14] *Cf. Drueding* v. *Devlin*, 234 F. Supp. 721 (D. Md. 1964), *aff'd*, 380 U. S. 125 (1965).

Moreover, it is clear that the "registered voters" measure causes registered voters in areas of underregistration as much deprivation as it does eligible, unregistered persons.[15] Thus all who live in the same district as an eligible, unregistered person, as of the date chosen for reapportionment, by that token and to that extent have their votes diluted—merely because of their place of residence.[16] No dilution of a citizen's vote should occur merely because of his neighbors—because they are uninterested in politics, too old and ill to register, unwilling to bother, or for any other reason do not register.[17] And despite the expression of the District Court to the contrary (R. 74; 238 F. Supp., at 476), there is a substantial number of eligible voters in Hawaii who are not registered to vote. The total possible voting population for 1964 was approximately 294,800. Of these per-

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[15] On this specific point, we will argue on the narrowest possible basis—that a system of representation based on "eligible voters" as a measure might be permissible. Even if this were so, it would not follow that the use of the "registered voters" measure was permissible.—Thus, even if this Court's cases were to be read to guarantee simply the right to vote, without regard to questions of equality of representation, the discrimination against geographical areas with low registration rates in terms of number of eligible voters would be enough to invalidate the "registered voters" measure.

[16] Thus the use of the "registered voters" measure cannot be sustained as a device to encourage registration. It penalizes the unregistered person's neighbors as well as him. See also [illegible] v. *Mayor of Baltimore, supra,* n. 13, pp. 55-56.

[17] It scarcely needs underscoring in this day and age that there are substantial areas of the country where systematic practices exist which prevent eligible persons from registering. If nothing else, the theory of the Voting Rights Act of 1965, Public Law 89-110, 79 Stat. 437, is witness to this. But the use of "registered voters" as a basis for apportionment would doubly reward success in preventing racial groups from registering; the areas in which they reside could thus be underrepresented.

We hasten to add that there are no racial patterns charged as to the percentage of registration to eligible voters in Hawaii. See n. 11, p. 80, *infra.*

sons eligible to vote, 55,400, or almost one-fifth, were not registered.[18]

And indeed there are significant variations in Hawaii, from area to area, on the proportion of registration among those eligible to vote. On Oahu, the most populous and urban island, 82.8% of the eligible voters were registered in 1960 while in the County of Hawaii 102.3% of those eligible were registered.[19] (R. 364)

(ii) Areas which have in the past received less representation than that to which they were entitled.

It is interesting to note that the areas with the lowest registration rate per population[20] are those which were deprived of equal representation in the unconstitutional

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[18] The statistics used by the District Court in reaching its conclusion that over 87% of the possible voting population of the State were registered contain a statistical error in that they included in the number of registered voters military personnel who had registered, while excluding all military personnel eligible to register from the total eligible voters.

Our figures correct this error and are derived as follows: In 1964, there were 283,400 civilians eligible to register. (Plaintiffs' Ex. 14, Table 7, R. 366). To this figure must be added 11,400 military personnel and adult dependents who met the qualifications for registration. (*Ibid.*, n. 1, R. 366 n. 1) (The figures for military eligibles are as of 1962 but it appears that this would be a conservative estimate for 1964. See Plaintiffs' Ex. 15, Table 4, R. 382). This indicates 294,800 as the total possible voting population. Registration for the 1964 general election was 239,361. (Governor's Ex. GO-4, R. 410).

[19] The reason the number of registered persons sometimes exceeds those eligible is that the eligibility figures are taken as of an earlier date than the registration figures and exclude military personnel, some of whom are registered. (R. 265, 364, 366) Thus, the percentages are useful basically for comparative purposes among themselves.

[20] Or per eligible voters, for that matter. See Plaintiffs' Ex. 14, R. 364.

apportionment of the original Senate scheme. Only 51.6% of Oahu's population over twenty years of age is registered, although all other basic areas have a registration of between 69.3% and 75.3%. Interestingly enough, the same is the case even in terms of eligible voters; only 82.8% of Oahu's eligible voters are registered, while between 99.8% and 102.3% of the eligible voters in the other basic areas are registered. (R. 364) Oahu concededly was the area discriminated against in the original Senate.

Persons in an area of underrepresentation have less inducement to vote than those in overrepresented areas, because their vote is less effective in decision making. Any use of a "registered voters" measure therefore tends to "lock in" previous malapportionment.[21]

In the 1958 pre-statehood election, on the registered voters for which House representation is currently based, the Hawaii Legislature was apportioned according to the Organic Act of Hawaii, which resulted in a serious discrimination against the populous area of Oahu.[22] Use of the

[21] In *WMCA, Inc.* v. *Lomenzo*, 238 F. Supp. 916 (S. D. N. Y. 1965), *aff'd*, No. 85, O. T. 1965, October 11, 1965, the District Court held that a proposed reapportionment plan based on a "registered voters" measure was unconstitutional because it was a "ghost of prior malapportionment." 238 F. Supp., at 924. Prior malapportionment had discriminated against urban areas; New York City under the apportionment measure of "citizens" would control 45.7% of the apportionment, but under a "registered voters" measure would control only 41.9%. In *Buckley* v. *Hoff*, 243 F. Supp. 873 (D. Vt. 1965), a "registered voters" measure was upheld, but only because it was substantially equivalent to a population measure, and only after the court found that it would not in fact perpetuate the effects of prior malapportionment. 243 F. Supp., at 876.

[22] The Organic Act, passed in 1900, established a Senate with four districts and fifteen members apportioned as follows:

(continued on following page)

"registered voters" method tends to carry forward this discrimination. Likewise, the Legislature's Senate plan which the court below held invalid was based on 1964 registered voters.[23] In 1964, the unconstitutional Senate provisions were in effect for purposes of the election. Therefore, the "registered voters" measure, as applied in the Senate Plan, similarly discriminated against Oahu.

This Court should not allow the effects of the previous malapportionment of Hawaii to be continued by use of the "registered voters" measure.

(iii) The poor and the communities in which they live.

The use of the "registered voters" measure in Hawaii discriminates against persons according to their economic condition. *Cf. Griffin* v. *Illinois,* 351 U. S. 12 (1956); *Douglas* v. *California,* 372 U. S. 353 (1963).

Hawaii	4
Maui	3
Oahu	6
Kauai	2

§§ 30, 31, 32, 31 Stat. 146-47 (1900), 48 U. S. C. §§ 565, 568-69 (1952).

It established six Representative districts, two on Oahu and on Hawaii and one on Maui and on Kauai. The thirty Representatives were apportioned as follows:

Hawaii	1st District—4
	2nd District—4
Maui	3rd District—6
Oahu	4th District—6
	5th District—6
Kauai	6th District—4

§§ 35, 38, 39, 31 Stat. 147-48 (1900), 48 U. S. C. §§ 570, 574-75 (1952).

Thus Oahu elected 40% of the Senate and the House of Representatives in the 1958 elections, although it had approximately 70% of the State's registered voters and 79% of its total population as of 1960. (R. 55)

[23] In fact, by order of the court. (R. 89)

The proportion of registered persons in Hawaii in the lower economic brackets is substantially less than those in the higher. As of January, 1961, among the eligible voters on Oahu with a family income of less than $4,000, only 43.8% were registered; while among those in the $10,000 to $14,999 bracket, 72.4% were registered; and among those in the $15,000 or more bracket, 77.7%, were registered. (R. 369) It is apparent that the use of registered voters unduly favors those on the higher economic levels and discriminates against those on the lower.

Moreover, this invidious discrimination against the poor necessarily also constitutes a discrimination against impoverished areas, or those containing significant "poverty pockets." Therefore, areas which perhaps most need representation in the Legislature are receiving the least.

(iv) The illiterate and the areas in which they live.

Literacy in English or Hawaiian is a condition imposed on the right to vote in Hawaii. Hawaii Const., Art. II. Because the measure used in Hawaii is "registered voters," the right to representation of illiterates is reduced. Even though illiterates may not vote because of a decision that their judgment in choosing a representative may be ill-formed, they still have a right to representation which should be afforded by the legislative apportionment measure.

Moreover, even registered voters residing in an area with a high concentration of illiterates are denied equal representation for their area. The poorly educated, like the indigent, are likely to be concentrated in specific geographical areas. Although these areas may need schools, libraries, and other facilities to a greater extent than areas of the

well-educated upper-middle-class citizens, the areas are effectively denied the representation to which they are entitled and therefore are likely to receive fewer facilities than the more educated and affluent areas.

Such a discrimination deprives these persons and others living near them of the equal protection of the laws.[24]

(v) Areas with a low median population age.

To be eligible to vote in Hawaii one must be twenty years old or older. Hawaii Const., Art. II. Evidence before the court below established that in Hawaii, like in most states —and particularly those which are attractive for retirement—some communities consist mainly of elderly, retired persons and others of young families with many children. (R. 271-72, 330, 364) Areas with many children are discriminated against by the "registered voters" measure. Two communities may have only 500 registered voters each, but if one community consists predominantly of the elderly and the other of families with an average of two or three children, it is obvious that their total population differs considerably.

Areas with many children clearly have a greater need for schools, recreational facilities, and libraries than areas with few children; however, these greater needs—which in Hawaii's centralized form of Government are principally a State responsibility—are not reflected in the "registered voters" measure of representation.

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[24] The District Court's statement that Hawaii has "an unusually literate citizenry" (R. 74; 238 F. Supp., at 476) does not diminish the significance of the discrimination against the illiterate and those who live near them, and it does not suggest that the illiterate are evenly distributed throughout the State. The court had no evidence before it concerning literacy rates.

(vi) The military and the areas in which they live.

The District Court held that military members and their dependents need not be reflected in the representation base to the extent that they are unregistered, and disapproved of a total-population apportionment for Hawaii because the presence of military personnel in certain areas would be reflected by that method. (R. 70-73; 238 F. Supp., at 473-75) It also used the existence of military personnel to explain deviations between population and registered voters in Hawaii. (*Ibid.*)

As to the second holding, the District Court was clearly wrong. The proportion of *civilian* persons who were registered voters in Hawaii in 1960 varied from 22% in the Tenth Representative District to 48% in the Fifth District. In the Fifth District, one Representative represented 5,666 civilians, while in the Tenth District one Representative represented 18,976 civilians. In five districts less than 30% of the civilian population was registered, while in seven districts 40% or more is registered. We set the statistics out in the margin.[25] These deviations are substantial, and the "registered voters" measure therefore violates the

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[25]

Repr. Dist.	1960* Registered Voters	1960** Civilian Population	Per Cent Registered
1	2,257	5,030	44
2	14,036	31,448	44
3	2,973	7,714	38
4	4,073	11,221	36
5	2,720	5,666	48
6	2,574	7,116	36
7	14,965	35,694	41

* From Plaintiffs' Ex. 1. (R. 339)

** From Plaintiffs' Ex. 16. (R. 391)

(continued on following page)

Equal Protection Clause even if one were to agree with the court's first holding—that the military may be ignored in an apportionment scheme except to the extent that they are registered voters.

However, the District Court also erred in its first holding. This Court has rejected an argument that an apportionment scheme may properly discriminate against the military by ignoring them in the representation measure. In *Davis* v. *Mann*, 377 U. S. 678, 691 (1964), the Court held:

> "We reject appellants' argument that the underrepresentation of Arlington, Fairfax and Norfolk is constitutionally justifiable since it allegedly resulted in part from the fact that those areas contain large numbers of military and military-related personnel. Discrimination against a class of individuals, merely because of the nature of their employment, without more being shown, is constitutionally impermissible." [26]

Here the District Court has clearly discriminated against the military and their dependents as such. Even apart from the teachings of *Davis*, the military and their dependents

8	18,369	62,532	29
9	7,410	30,933	23
10	17,003	75,895	22
11	12,553	53,263	23
12	10,000	25,372	39
13	7,807	27,220	28
14	16,056	40,967	39
15	25,869	58,322	44
16	16,176	42,430	38
17	15,880	36,648	43
18	11,338	28,034	40

[26] See also *Wilkins* v. *Davis*, 33 U. S. L. Wk. 2364 (Va. Sup. Ct. App., January 18, 1965).

are entitled to representation in Hawaii. The relationship of the military population to the civilian community in Hawaii is substantial. (R. 287-90)[27] In Hawaii, expenditures by the military establishment exceed the revenues from the sugar, pineapple, or tourist industries. The military establishment employs thousands of civilians. Military personnel send their children to the public schools of the State,[28] are subject to State laws, pay State sales tax whenever they make a purchase in the civilian community, and partake of the entertainment, cultural, and recreational facilities in the State. Many of them own or rent homes off-base.[29] Therefore, their needs from, and obligations to the State of Hawaii are similar to those of the civilian population. That few of them are registered voters is not a basis for discrimination against them.[30]

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[27] In 1960, all military personnel and their dependents were included among the "people" of Hawaii in determining the number of Representatives in Congress to which Hawaii was entitled. They should also be included in determining representation in the State Legislature.

[28] Fifteen percent of the public school children are military dependents. (R. 288) Certainly the areas where this impact occurs deserve a population-based representation.

[29] Of the military household heads on Oahu, 71.5% have lived in the State at least a year, and 11.4% over five years. There are about 24,000 Oahu households headed by service members. (Defendants' Ex. A, R. 395)

[30] Moreover, there has been discrimination against the military's right to vote in Hawaii. Therefore, even assuming that eligible voters, rather than population, were a permissible basis for apportionment, the present scheme would have to fall.

The Hawaii House is presently apportioned on the basis of 1958 registered voters. The qualifications for voting in that election were established by the Organic Act of the Territory of Hawaii, which absolutely prohibited voting for the Territorial Legislature by military personnel and their dependents. "No person shall be allowed to vote who is in the territory by reason of being in the Army or Navy or by reason of being attached to troops in the

The District Court's decision seems to have been influenced by an unwarranted fear of the size and fluctuation of the military population in terms of participation in the representation base.

Hawaii, since annexation in 1898, has always been an important military base, and the number of members of the armed forces stationed in Hawaii has been relatively stable, as indicated in the following United States Census Bureau data (Plaintiffs' Ex. No. 15, Table 9, R. 388):

1947	38,000	1956	58,000
1948	33,000	1957	60,000
1949	31,000	1958	55,000
1950	21,000	1959	56,000
1951	44,000	1960	59,000
1952	55,000	1961	61,000
1953	48,000	1962	79,000
1954	38,000	1963	60,000
1955	56,000	1964	60,000

In approximately the same period (1946 to 1962) the civilian population increased from 470,163 to 635,888 and the number of registered voters increased from 103,180 to 221,650. (R. 360)

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service of the United States." § 63, 31 Stat. 152 (1900), 48 U. S. C. § 619 (1952).

A *per se* prohibition against military voting like that in the Organic Act, if promulgated by a State, would violate the Equal Protection Clause, as this Court held in *Carrington* v. *Rash*, 380 U. S. 89 (1965). A scheme of legislative apportionment based on such an unconstitutional system of registration denies equal protection of the laws.

Present practices defining qualified voters do not discriminate against the military to the extent prevalent under the Organic Act. (R. 283) Military-related personnel may register if they live off-base and comply with special requirements regarding proof of residence and domiciliary intent. However, those persons required to live on a military base may not register notwithstanding domiciliary intent. *In re Robinson*, Hawaii Sup. Ct., Oct. 30, 1964, unreported memorandum decision. The *Robinson* decision was rendered a short time prior to the 1964 elections and was used as a criterion of registration in those elections.

The court below pointed to the abnormal wartime situation in Hawaii in 1944 when the military population was almost equal in size to the civilian population and expressed the fear that thereby "areas which normally would have a total population entitling them to but a small percentage of the total number of legislators would suddenly find themselves controlling over 90% of the legislature. . . ." (R. 72; 238 F. Supp., at 474-75)

But this inflation was not so much caused by the presence of additional permanently stationed personnel, as by the flow of troops in transit. Hawaii was a staging area for the Pacific war. Legislators or the convention amending the State Constitution could find means of coping with such extraordinary wartime or emergency situations.[31] For example, one method might be to include within the apportionment base only those persons who have been in the State for at least one year, thus excluding military and civilian transients alike. Another might be to provide for certain similar exclusions if the censal period should come at a time of national emergency. The abnormalities of 1944 are a poor excuse not to provide representation for what has been a stable factor in Hawaii for the past two decades; they do not justify a discrimination against the military as such.

3. *Since the Hawaii Constitutional Provisions Provide for Continuing Reapportionment of the House on a "Registered Voters" Measure, They Cannot Be Sustained Even if the Present Apportionment Happened to Coincide Substantially With That Produced by a Population Measure.*

Finally, even if the "registered voters" measure presently happened to produce a result substantially equivalent

[31] The Governor has never taken the position that total population as indicated in the Federal Census as we know it today is the

to that of a population measure—which it does not, as we have demonstrated in subpart 2 above—the provisions of the Hawaii Constitution providing for it clearly could not be sanctioned on that basis.

(a) The Hawaii House reapportionment section (Article III, Section 4) provides for decennial reapportionment, in the years 1969, 1979 and so forth, "on the basis of the number of voters registered at the last preceding general election." Thus there is before this Court, as there was before the District Court, not only the question whether the actual present apportionment of the Hawaii House can be squared with the Equal Protection Clause, but also whether the use of the "registered voters" measure on a continuing basis can be affirmatively upheld. The District Court declared this section of Article III of the Hawaii Constitution to be "constitutional and valid" under the Federal Constitution, and thus approved prospectively the continuing use

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only permissible measure of representation. The District Court evidently understood the Governor's position that the appropriate representation measure was one that related to population, rather than to voters, as meaning that the raw figures had to be followed literally, and thus expanded on what it considered the "grossly absurd and disastrous results" (R. 71; 238 F. Supp., at 474) which might follow on account of the size and fluctuation of the military population, and because of persons visiting as tourists, ships' crews, and the like. We do not contend that the raw census figures are the only permissible measure, and accordingly the consequences adverted to by the court need not follow.

The point is, however, that while the District Court might have demonstrated certain instances in which raw census population would not be an entirely appropriate measure, this demonstration does not validate the use of the "registered voters" measure. The starting point must be population. If the census figures must be refined in order to obtain a fair estimate of the nontransient popuuation of the State, then this should be done. But this is not an excuse for use of a measure of representation—the "registered voters" measure—which starts from an entirely different premise from that of population.

of the "registered voters" measure for future reapportionments.

We submit that this holding was in clear error. We have demonstrated in point 1 above that the "registered voters" measure cannot be sustained as an appropriate measure in itself. It could only be sustained on the basis of its correspondence, in result in a particular instance, with a permissible population-based measure.

But obviously there is no way of predicting what correlation will exist between registered voters and population in the future in Hawaii. Number of registered voters depends on many variables other than the population total —age, residence, economic condition, education, number of children per family, political interest, and so forth.[32] Therefore, even if at any given time the "registered voters" measure happened to yield results equivalent to a population measure, it could not be upheld on a continuing basis as an appropriate measure.[33] The District Court's holding

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[32] For one thing, the "registered voters" measure underestimates the more rapidly growing areas (both in terms of migration and of birth rate)—and overestimates the shrinking areas—because of the residence requirement for registration and the fact that one may remain lawfully registered in an area for a time after moving. Thus the use of registered voters magnifies the unavoidable but still undesirable lag in responsiveness to population shifts caused by the lapse of time between reapportionments.

[33] Even if one were to assume that registered voters had a significant correlation with total population over a long period of time, registered voters constitute such a small proportion of the total population that shifts in the number of registered voters at any particular time would not necessarily reflect shifts in total population. The number of registered voters is so small that it would tend to change rapidly within the State as a whole and within districts of the State particularly. For a discussion of the "law of large numbers" which establishes that the larger the numbers used the smaller the fluctuation, see R. 318. If this basis were to be approved, reapportionment once every ten years, based on a particular point in time, as provided by the Hawaii Constitution,

to the contrary, which did not even essay to prophesy future correlation, was in clear error.

(b) In addition, the "registered voters" measure effectively inhibits comparison of total population and registered voters in Hawaii. The "registered voters" measure permits a scheme of district boundaries in Hawaii which are badly out of phase with census boundaries. Hawaii uses its precinct registration, rather than census figures, to determine the number of registered voters. Also, apportionment occurs at times other than the time of the federal census—1959 and every tenth year thereafter as to the House.[34] Rather than justifying the measure, as the District Court found, this condemns it; in light of the probable substantial deviations between registered voters and total population, any rational plan must at least allow comparison to assure some correlation in fact.[35]

C. The District Court Erred in Sanctioning the Multimember Districting Scheme in the House.

The second basis on which we urge that the apportionment of the Hawaii House of Representatives should have

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might well be inadequate to reflect total population shifts or even to reflect the probable distribution of registered voters in following periods.

[34] 1975 and every tenth year thereafter in the proposed Senate plan.

[35] If this Court finds the "registered voters" measure to violate the standards of equal protection of the laws, the provisions concerning the time of reapportionment of the House should also be held to be invalid. For reapportionment occurring nine years after the federal census would create a legislature which would be based on population distribution up to nineteen years previously. This would be "constitutionally suspect" (*Reynolds* v. *Sims, supra,* 377 U. S., at 584) in itself, and the circumstances in Hawaii would confirm the suspicion: such a time-lag after the census is not administratively necessary—indeed, it is permissible only if the "registered voters" measure is used—and would be highly unreasonable in light of the rapidly shifting Hawaii population.

been affirmatively declared unconstitutional is its arbitrary use of multimember districts.—In this subpart, we will also develop some of the bases for the reasoning which, in part II, we will urge in support of the District Court's rejection of the Legislature's plan for Senate reapportionment, although the Senate plan clearly presents a much more aggravated case, particularly when taken against the backdrop of the House.

As the table reproduced at p. 10, *supra,* indicates, the Hawaii House is composed of a variety of single-member and varying multimember districts. Only five of the present 18 House of Representative Districts are single-member districts. Two Representative Districts have two members each, four have three members, six have four members, and one has six members. Five of the six four-member districts are on Oahu, as is the six-member district. The average number of Representatives per district in Oahu is 3.6, and there is no single-member district on Oahu. —All but one of the proposed Senate districts, under the proposed scheme that the District Court held unconstitutional in its April order, were multimember districts. Indeed, in view of the multimember system of districting in the House, and the predictable tendency of any proposed Senate reapportionment to create larger districts than the House districts,[1] it may well be assumed that any plan for Senate reapportionment will include—and probably be dominated by—multimember districts unless the system of multimember districts in the House is invalidated.

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[1] The legislative history of the Legislature's proposed Senate reapportionment plan shows that one of the purposes in drafting the plan was to create Senate districts which were larger than existing House districts. (R. 123-24, 127-28) Historically, Senate Districts in Hawaii have been larger than Representative Districts.

We recognize that in *Fortson* v. *Dorsey*, 379 U. S. 433 (1964), a system involving multimember districts employed in Georgia was held not to violate, on its face, the Equal Protection Clause. Under the system in *Dorsey*, Senatorial districts were based on population, but if a county was entitled to two or more districts on that basis, all voters of the county were entitled to vote for Senators from each of the county's districts. Thus, to that extent, the counties which had more than one district became multimember districts. On appeal, this Court held simply that there was no mathematical disparity between the weight of votes in single-district counties and that in multidistrict counties, and that therefore there was no *per se* violation of the Equal Protection Clause.

The Hawaii House's multimember districting system presents a situation clearly distinguishable from that in *Dorsey*:

(1) In *Dorsey*, the system of multimember districting was drawn on a uniform, historical basis, not shown to be arbitrary. In the Hawaii House, the multimember districting within the "basic areas" is purely arbitrary, particularly as district size is concerned.

(2) *Dorsey* did not deal with the question of submergence of minorities within large multimember districts; this matter was expressly left open by the Court. (379 U. S., at 439) Indeed, *Dorsey* involved the election of 54 legislators from 54 districts; this acted as a brake on submergence of minorities and tends toward the development of identifiable constituencies. In Hawaii, there is evidence of submergence of minorities.

(3) The only challenge in *Dorsey* was to the deprivation of equal voting weight; while in the present case,

the deprivation of other elements of the right to representation on an equal basis is challenged.[2]

1. *The arbitrariness of the construction of the districts.* —The Hawaii House districts are constructed in a completely arbitrary fashion. Within the "basic areas," they are not constructed uniformly on boundaries having independent significance. In contrast to the system upheld in *Dorsey,* no uniform or reasonable policy was followed in their creation. Some districts follow lines established for election, educational, judicial, and taxation purposes. Others straddle such lines. (R. 320-25) Even more significantly, while individual lines may have been "historical, political, geographic [or] physical," as the District Court said (R. 75; 238 F. Supp., at 476), there is no suggestion of any fixed or rational scheme accounting for the *size* of the various districts. Thus there is nothing of record in any respect suggesting or indicating why certain districts should be drawn so as to require as many as six Representatives on the "registered voters" measure employed, and others only one.[3] The District Court's opinion is also completely silent on this whole matter.

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[2] Moreover, appellees in *Dorsey* argued that the voting weight of voters in the multidistrict counties was less than that of voters in single-district counties. Here, we argue that the right to representation of the residents of single-member districts is impaired as compared with that of residents of multimember districts.

Also, in *Dorsey* this Court considered a legislature in which only one house was apportioned through the use of multimember districts. The proposed Senate plan involved in this case was based on a multimember district plan—as was the original Senate apportionment declared unconstitutional by the District Court—thereby creating a situation in which both houses of the Hawaii Legislature were to be subject to multimember districting. We will discuss the proposed Senate plan in Part II, *infra.*

[3] Indeed, the only stated policy in the constitutional convention as to the construction of districts appears to have been the very

Other factors indicate the arbitrariness of the boundaries and district size in this random multimember districting scheme. Unlike the districts in most states, the districts in Hawaii were drawn in such a way as to create a substantial lack of cohesion with census tracts, and thereby prevent any meaningful use of the federal census figures in reapportionment.[4]—These figures are, of course, the basis for reapportionment of the Federal House of Representatives and that of the legislatures of most states.

Another factor suggesting arbitrariness is the fact that in the decennial reapportionment by the Governor, the last, rather than the first, resort in reapportionment is the redrawing of the districts. The Constitution "freezes" the districts originally created, providing that in the event of population shifts, the device the Governor is to follow in reapportionment is changing the number of Representatives per district. Only as a last resort—when on a mathematical basis the indicated apportionment in a Representative District falls below one-half of a Representative—is there to be any change of the district boundaries. (Article III, § 4) In view of the arbitrary nature of the original construction of the districts, this provision appears itself to be confirmatory evidence of arbitrariness.

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usual and conventional policy of creating Senate Districts with larger constituencies than Representative Districts. Obviously, the use of multimember Representative Districts subverted this policy by the creation of Representative Districts so large that in one case one would, if it had been a Senatorial District, have been entitled to elect three Senators. Pursuance of the stated policy of having House Districts with smaller constituencies than Senate Districts would have indicated that the House Districts all be single-member.

[4] The District Court recognized this. (R. 75; 238 F. Supp., at 476) Indeed, over three-fourths of the Representative District boundaries do not coincide with census tract lines. (R. 222) This is not caused by any lack of census tracts to use as "building blocks." In Oahu alone there are 113. (R. 219)

The arbitrary choice was not a necessary one. It was entirely feasible to have provided single-member districts for the House.[5] Exhibits submitted by the plaintiffs clearly demonstrated this. (Plaintiffs' Exs. 6, 7, 8 and 9, R. 340-42)[6] And it would be feasible to follow census boundaries in apportionment—if conducted as part of a population-based system. (R. 273)

As we develop below, there are inequities in any system of multimember districting; peculiar inequities in a multimember system in which the number of members per district varies extensively from district to district; and further peculiar inequities in the Hawaii House system. In *Reynolds* v. *Sims,* 377 U. S. 533, 565 (1964), this Court stated: "The concept of equal protection has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged." In order to say that persons do not stand in the same relation, a rational distinction between them must be shown. *Reynolds* v. *Sims, supra,* 377 U. S., at 565-66, 578-81; see, *e.g., Skinner* v. *Oklahoma,* 316 U. S. 535 (1942); *Gomillion* v. *Lightfoot,* 364 U. S. 339 (1960).[7] The use of varying multimember districts in the

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[5] And to reapportion them shortly after the federal census on an expedited basis—about a week's work for a small staff. (R. 257-58)

[6] Plaintiffs' Exhibit 8, demonstrating a single-member House districting system for Oahu, is not printed in the Record, but by stipulation of the parties, nine copies thereof will be filed with the Clerk.

[7] In *Drew* v. *Scranton,* 229 F. Supp. 310 (M. D. Pa. 1964), *remanded on other grounds,* 379 U. S. 40 (1964), the District Court found that, among the larger Pennsylvania counties, fourteen were single-member districts, while fifteen others contained single-member and two-, three-, and four-member districts. The court held, "In the absence of any legislative history or other explanation justifying it, and we have found none, we can only conclude that this

Hawaii House, for the reasons we will develop further below, treats members of the population of Hawaii in different fashions. Since there is no rational basis, in terms of the creation and construction of the districts, for this disparity of treatment, we submit that it cannot be squared with the Equal Protection Clause.[8]

2. *Overrepresentation of the large, multimember districts.*—Once the arbitrariness of the construction of district lines—and thus of the choice of whether a district shall have one, two, three, four or six Representatives—is established, the impermissibility of the overvaluation of

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districting is either the result of gerrymandering for partisan advantage, as was suggested at the hearing, or that it is wholly arbitrary and capricious." *Id.*, at 326. Therefore, the districting violated the Equal Protection Clause.

In *Sincock* v. *Duffy*, 215 F. Supp. 169 (D. Del. 1963), *aff'd sub nom. Roman* v. *Sincock*, 377 U. S. 695 (1964), the court considered a plan in which two small counties were given one at-large senator each, in addition to the senators apportioned to their single-member districts. However, the third and largest county in the state received no at-large senator. The court found that inhabitants of small counties were thus represented by two senators while those of the large county were represented by one. The court held that this system was arbitrary, was adopted for the purposes of gerrymandering, and would violate the Equal Protection Clause even if senators were otherwise equally apportioned.

[8] In *Reynolds* v. *Sims*, 377 U. S. 533 (1964), this Court recognized that the arbitrariness of an apportionment scheme is a basis for holding it to be unconstitutional. The Court said, "Furthermore, the existing apportionment, and also to a lesser extent the apportionment under the Crawford-Webb Act, presented little more than crazy quilts, completely lacking in rationality, and could be found invalid on that basis alone." 377 U. S., at 568. It also said, "Indiscriminate districting . . . may be little more than an open invitation to partisan gerrymandering." 377 U. S., at 579. The construction of Representative Districts in Hawaii was arbitrary and indiscriminate particularly in terms of the relative sizes of the districts.

the representational strength of the person who happens to reside in a large, multimember district—or at least that of the majority in that district—becomes plain. While the citizen in a single-member district has but one representative to protect his interests, one in a six-member district has six. As a matter of political realism, a person in such a district has representational advantages over one in a single-member district. The majority in such a large district will tend to have an inordinate influence in the political life of the State.

To be sure, to some extent this is counterbalanced by the fact that the district is *pro tanto* larger. But the existence of this superior power cannot be denied as a matter of practical political realism. The reasons for this are the same as those which make it incumbent upon presidential candidates, in the nomination or general election stages, to concentrate on those states with the largest number of convention or electoral votes. While to be sure a measure of extra effort is required in campaigning in these states because of their greater population, the rewards are well worth it. Thus, the District Court well spoke of the large multimember districts as "monolithic political units." (R. 160; 240 F. Supp., at 729)—For example, one out of the eighteen House districts, with six Representatives, controls 12% of the House.

The effect of this overrepresentation for the large, multimember districts is accentuated when one remembers that in Hawaii the population of even the larger multimember House districts is still small in absolute terms, and the relationship between constituent and representative is apt to be direct and immediate. The four-member Representative Districts in the Hawaii Legislature, even on the

basis of 1964 registration, have only about 20,000 registered voters. (See p. 10, *supra*) Their population, in some cases, is as low as 36,000 or 40,000. Even the largest multimember district, the Fifteenth Representative District, had only 31,302 registered voters in 1964, and a 1960 population of only 60,125. This intensifies the degree of overrepresentation enjoyed by an individual in a large, multimember district; he has a greater number of representatives, yet they all stand in a substantially immediate relationship to him.

While the matter is necessarily speculative, it is instructive to remember that the bulk of the larger Representative Districts are on Oahu. The political representation of Oahu in the House is intensified through this factor. At the time that the House multimember districting scheme was adopted, a Senate was also adopted which gave political dominance to the other islands. Thus, although the overall scheme certainly could not be squared with *Reynolds* v. *Sims* and its companion cases, the overrepresentation of the Oahu multimember districts through the use of multimember districting may well have been intended as a counterbalance to the geographical representation provided in the Senate, and therefore might have been the less arbitrary on that account. Not only does this factor suggest the inseverability of the apportionment scheme for the two houses, as we have developed in subpart A, pp. 33-35, *supra,* but it indicates why, even following the District Court's approach of viewing each house as a single chamber, the House multimember districting scheme provides overrepresentation to the large, multimember districts and violates the Equal Protection Clause.

The Hawaii House system thus arbitrarily gives certain parts of the population of the State as many as six Representatives and other parts of the population only one

Representative. While there is equality of voting strength in the sense of the number of registered voters per Representative, there clearly is no equality of representation; and that inequality stands without rational justification.

As the District Court put it in *Drew* v. *Scranton*, 229 F. Supp. 310 (M. D. Pa. 1964), *remanded on other grounds*, 379 U. S. 40 (1964), absent a justification for a system of multimember districting:

> "[E]ach voter should participate in the selection of one of the representatives only. For since the persons elected are to comprise a boiled down reflection, as it were, of the larger electorate, and since each of them, therefore, in a very real sense stands in the assembly in the place of a group of voters, it would appear to interfere with and dilute the voting rights of others for a voter to participate in the election of more than one representative." *Id.*, at 326.

The District Court continued:

> "Certainly a voter in a four-member district will not only have four votes for representative, but he will also have four members of the House who will be especially concerned with his views and interests and amenable to his persuasion, since they will want the benefit of his suffrage for reelection. The voter in a single-member district, however, will have only one representative to look to express his views and espouse his interest." (*Id.*, at 327)[9]

The Hawaii House system of mixed, varying, multimember and single-member districts deprives the population in the single-member districts of equal representation,

[9] *Cf. Butcher* v. *Bloom*, 415 Pa. 438, 467, 203 A. 2d 556, 572-73 (1964).

and in the absence of rational justification is condemned by the Equal Protection Clause.[10]

3. *Denial of equal protection to minorities within the large, multimember districts.*—While the majority voice in a large, multimember legislative district speaks loudly, the minority voice may not speak at all.[11] While the Senate plan, rightly rejected by the District Court, certainly provided for a submergence of minorities, the existing House apportionment scheme does the same thing.

The Hawaii population is composed of extremely diverse groups, with diverse cultures, ancestry, language, interests and needs. They live together in a very limited amount of usable living space. Yet, as pointed out above, no consideration was given by the convention to social and economic factors in drafting Representative District lines. The

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[10] It does not appear that in *Dorsey* there was any challenge based on overrepresentation for the citizens in the large, multimember districts. The Court's opinion discusses only the contention that certain people within the multimember districts were, because of the arrangement in Georgia, discriminated against. The question of overrepresentation of the multimember districts does not appear to have been discussed.

[11] In our discussion of submergence of minorities, we do not suggest that racial discrimination accounts for the construction of the districts in Hawaii, nor do we urge that districts be constructed so as to give any seat to any person of a particular race. We have no quarrel whatsoever with the conclusion that the Equal Protection Clause "does not demand an alignment of districts to assure success at the polls of any race. No line may be drawn to prefer by race or color." *Mann* v. *Davis*, 245 F. Supp. 241, (E. D. Va. 1965), *aff'd sub nom. Burnette* v. *Davis*, Nos. 241, 424, O. T. 1965, October, 1965. It is not our position that district lines should be drawn to prefer any race. Our position is that Hawaii's districting system affirmatively discriminates against the right of all the people to equally fair and effective representation, minimizes and submerges minorities, and conduces toward election of legislators by less than a majority in each district, and therefore is in conflict with the Equal Protection Clause.

district lines drawn were completely arbitrary. The result is to submerge minorities. By the time of its last order in the case, the District Court had begun to realize this. Its April opinion indicated that the Fifteenth Representative District, with its six Representatives, was "too large," and observed that it amounted to a strange mixture of an area consisting of an extremely high percentage of professional and managerial people, in certain areas, and a high concentration of low-middle-income persons in another.[12] (R. 157-58; 240 F. Supp., at 728-29) This district elects 12% of the total members of the House of Representatives. The election of six members on a general ticket from a district of this nature is bound to overestimate the representation of those in the majority party or faction of the day and completely submerge the representation of the minority.

This case was tried (as to the multimember districting in the House)[13] before this Court's decision in *Fortson* v. *Dorsey*, which held that multimember districting was not to be condemned *per se*.[14] In the case of the Hawaii House multimember districts, extensive proofs were not put in as to the details of the submergence of minorities. Yet the existence of minorities in these districts is plain. We urge the Court not to permit the affirmative sanctioning of a rep-

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[12] This district, in fact, combines: The Waikiki resort area; the "central area," which contains operatives, laborers, clerical workers and middle and lower-middle-income people; the University of Hawaii area; and the "upper area," containing many upper-income professional and managerial people. (R. 269-72, 329)

[13] The trial of this issue took place January 11-13, 1965. (R. 193)

[14] To be sure, there were earlier dicta suggesting the propriety of some multimember districts in one house of a State legislature. *Reynolds* v. *Sims*, *supra*, 377 U. S., at 577, 579, quoted in *Dorsey*, 379 U. S., at 436.

resentation system with as much potential for the submergence of minorities as Hawaii's House apportionment, in view of the lack of any rational justification or basis for the entire construction of multimember districts in the House.[15] In the light of the affirmative findings of the District Court of the diversity of the population and the presence of minorities in the larger multimember districts (R. 156-59; 240 F. Supp., at 727-29), of the need for identifiable constituencies (R. 158, 161; 240 F. Supp., at 729-30), and of the submergence of minority groups (R. 162 n. 5; 240 F. Supp., at 731 n. 5), and the absence of any rational basis for the drawing of the districts, this Court should not sustain the District Court's affirmative approval of the multimember districting scheme in the House.

The interest against which these multimember districts offend was well described in the debates leading up to the

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[15] *Burnette* v. *Davis*, Nos. 241, 424, O. T. 1965, October 25, 1965, *affirming Mann* v. *Davis*, 245 F. Supp. 241 (E. D. Va. 1965), is not to the contrary. There the District Court found that the two areas were unified socially, geographically and politically, and that the district was not so large "as to demand the establishment of identifiable constituencies." Also, the District Court suggested that because the other house of the Virginia Legislature was constructed purely on the basis of single-member districts, any minorities allegedly submerged would be adequately represented there. 245 F. Supp., at 244. On the contrary, in Hawaii, the original Legislature and the Legislature contemplated by the provisional Senate plan put forward in April 1965, are both composed of two multimember chambers.

The present case deals with a purely arbitrary system of districts, both in terms of boundaries and respective sizes. The District Court found that the areas within the Representative Districts were not unified socially, (R. 156-58; 240 F. Supp., at 727-29) while the District Court in *Burnette* affirmatively found such unity. (245 F. Supp., at 244) Moreover, the districts here, one of which elects as much as 12% of the House of Representatives, and many of which elect 8% thereof, are so large in terms of the overall size of the legislative body that they demand the establishment of identifiable constituencies.

1842 statute[16] which established the principle, followed ever since, that single-member districts be employed in the election of representatives for the Federal House of Representatives. It was then observed:

> "The general-ticket [multimember] system disfranchises the minority in a State, however near it may approach to a majority, and in however so many districts it would actually constitute a majority, and be entitled to a representation in Congress. Sir, what do we know of the minority in Missouri, or Alabama, or New Hampshire? Its voice is never heard in this hall; its vote is never counted. It is subjected to laws it has no agency in making, and to taxes which it has no representative agency in imposing, . . . It is true, a choice by districts has its minorities; but what is lost in one district, may be gained in another; and thus, as far as can be, an equality of representation is preserved of all the people, and a just proportion of relative power is secured to all the States."
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> "Next in importance to the right of representation, is to make that representation equal and efficient to all who are entitled to its enjoyment. The single districts will effectually secure this result. Each separate interest I have named will have its equal share of representation. The agricultural, the manufacturing, the mechanical, and the commercial districts, may each have the member of their choice to represent their peculiar interest. Thus, while we secure a Representative to every local interest, we at the same time prevent all sectional combinations, and give to the people of every class a useful, a responsible, and an equal rep-

[16] 5 Stat. 491 (1842).

resentation in Congress." 1841-42 Cong. Globe, app., pp. 793-94, 796.

Absent some rational basis supporting a contrary result, the systematic failure of a state to afford representation to the minority cannot, we submit, be squared with the Equal Protection Clause. An arrangement like that of the Hawaii House tends to submerge minority views not only in the multimember districts themselves but in the Legislature as a whole. The foundation of representative government is that the Legislature constitutes a microcosm of the State, giving reflection to the needs, desires and views of all its elements. While such a microcosm cannot be inevitably guaranteed under a representative form of government, certainly any system which on an arbitrary basis prevents its occurrence should not be permitted to stand.

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There are other vices inherent in the multimember district system employed in Hawaii. On the "general ticket" basis on which the candidates run, individual candidates are often elected by a vote of less than the majority of those voting. In the massive Fifteenth Representative District on Oahu, where six Representatives are elected, four of the winners in the 1964 general election received less than a majority vote, one receiving only 44% of the poll. Similarly, in the Third Senatorial District (Maui), where two long-term Senators were to be elected in 1964, both were elected with less than a majority of the votes cast. Three of the four Representatives in the Seventh Representative District (Maui) were similarly elected by less than a majority; and other instances of election by less than a majority were presented in that election. (Governor's Ex. GO-4 (unprinted portion) (fol. 974-75, pp. 5, 7, 8))

In a single-member district, the winner of the election, assuming a two-candidate race, will have a majority of the

votes cast. As indicated, this is not necessarily the case in a multimember district; and the likelihood of election by less than a majority would appear to increase as the number of members to be elected increases. The failure of voters to vote for a full slate in a multimember district may be caused by a variety of factors, such as lack of interest in the full slate of candidates, or lack of familiarity with or identification with the full slate; or resort to the questionable practice of "block voting" in the belief that this is the only way in which a minority may make its voice heard in a multimember district. The principle of majority rule within a district, which underlies the "one-man, one-vote" rulings of this Court, is a basic one. Hawaii's multimember districting system subverts this principle; on this basis, taken with the other infirmities we have referred to, it cannot be squared with the Equal Protection Clause.[17]

D. The District Court Erred With Respect to Various Matters Relating to Remedies.

We submit that a number of the rulings of the District Court, embodied in its February 17 order and reaffirmed in its April 28 order, improperly foreclosed certain avenues from which a proper reapportionment scheme might come,

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[17] The debates leading to the enactment of the 1842 Congressional statute providing for single-member districts in the House of Representatives contains a cogent observation by Senator Miller of New Jersey which makes the point we develop in the text:

> "The single [member] district system will also put an end to all the petty contrivances, those caucus combinations by which unworthy candidates too frequently procure themselves to be placed upon a general ticket. We have all seen and felt the effects of this odious practice. Men, who could not command a hundred votes when standing alone upon their own merits, have, with the aid of a few active and zealous personal friends, contrived to get themselves upon a party ticket, along with more popular and worthy candidates; thus uniting the good with the bad, and then, by means of party discipline, riding triumphantly into power against the honest wishes of the very people who voted for them. But, if we elect by single

were unduly coercive under the circumstances in which they were rendered, or were otherwise erroneous.

1. *The foreclosure of provisional reapportionment.*— Initially, the District Court expressly held in its February 17 opinion that the Hawaii Legislature lacked the power to reapportion the Senate pending the adoption of a valid constitutional amendment. (R. 78; 238 F. Supp., at 478) While it apparently departed from this holding in its March order permitting the Legislature to propose a provisional plan, the Court, by reinstating the February order in its April 28 order upon its rejection of the provisional Senate plan proposed by the Legislature, apparently reaffirmed its earlier ruling that a provisional plan could not be adopted by the Legislature. (R. 164; 240 F. Supp., at 732) Although, as we will develop in subpart B of Part II, the District Court certainly has special powers with respect to any provisional plan adopted by the Legislature, it was error for the District Court to hold that the Legislature lacked any power to adopt a provisional plan. This error of the District Court led it to impose the extraordinarily tight time schedule that there be a permanent constitutional amendment put into effect before the 1966 general elections. (R. 80-81; 238 F. Supp., at 479)

The holding of the District Court flies in the face of *Maryland Committee* v. *Tawes,* 377 U. S. 656 (1964). There, the Maryland Court of Appeals held that if the apportionment provisions of the Maryland constitution were invalid, the General Assembly was empowered to enact a bill reap-

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districts, every candidate must stand or fall upon his own individual character; he can borrow no influence from his fellow-candidates, no support from combinations with others. He must fight upon his own hook, and therefore will not venture into the canvass, unless he has merits to recommend him to the confidence of the people of the district where he resides. . . . " 1841-42 Cong. Globe, app., p. 790.

portioning its membership.[1] It stated that with the apportionment provisions of the constitution invalidated, the powers of the legislature were plenary and not limited by constitutional provisions as to apportionment.

The proposition was affirmed by this Court:

> "With the Maryland constitutional provisions relating to legislative apportionment hereby held unconstitutional, the Maryland Legislature presumably has the inherent power to enact at least temporary reapportionment legislation pending adoption of state constitutional provisions relating to legislative apportionment which comport with federal constitutional requirements." 377 U. S., at 675-76.

The Hawaii Constitution, like that of Maryland, confers broad powers on the legislature. Article III, Section 1 provides:

> "The legislative power of the State shall be vested in a legislature, which shall consist of two houses, a senate and a house of representatives. Such power shall extend to all rightful subjects of legislation not inconsistent with this constitution or the Constitution of the United States." [2]

The invalidity of the apportionment provisions of the State Constitution and resultant lack of applicable consti-

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[1] *Maryland Committee* v. *Tawes,* 228 Md. 412, 438-39, 180 A. 2d 656, 670 (1962).

[2] The constitutional convention which drafted Section 1 intended this grant of legislative powers to be as broad as possible. "The legislative power is extended to 'all rightful subjects of legislation . . .' which phrase is intended as the broadest possible grant. Unlike Section 55 of the Organic Act, from the first sentence of which said phrase is derived, and the constitutions of many of the states, the restrictions on the legislative power are not to be found in this article but, if at all, in other parts of the Constitution." (R. 345)

tutional provisions, plus the provisions conferring plenary "legislative" powers over all "rightful subjects of legislation" on the Hawaii Legislature, provide that Legislature, as a matter of federal law, with authority to reapportion at least temporarily.[3] This Court has made clear that the federal judiciary may, as a matter of federal law, reapportion if necessary to prevent denial of constitutional rights. *Reynolds* v. *Sims,* 377 U. S. 533, 586-87 (1964); *cf. Travia* v. *Lomenzo,* No. 633, O. T. 1965 (decided Dec. 13, 1965). It would be a strange holding that the power of the legislative body of a state would be any less, at least where the State Constitution vests plenary law-making powers in it. After all, "primary responsibility for legislative apportionment rests with the legislature itself," *Maryland Committee* v. *Tawes, supra,* at 676, and "reapportionment . . . [is] basically a legislative function." *Roman* v. *Sincock,* 377 U. S. 695, 702 (1964). *Cf. Reynolds* v. *Sims, supra,* 377 U. S., at 586; *Davis* v. *Mann, supra,* 377 U. S., at 693.

Thus, we contend, the Legislature has the power to reapportion the Senate on an interim basis. Moreover, since, as we have developed in subparts A, B, and C above, the apportionment of the House cannot be held to be constitutional, the power of the Legislature to adopt an interim reapportionment plan would extend to both houses.

The District Court's holding to the contrary was apparently based on *Guntert* v. *Richardson,* 47 Haw. 662, 394 P. 2d 444 (1964). It is clear that the reliance was an erroneous one.

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[3] See also, *Sincock* v. *Duffy,* 215 F. Supp. 169, 191 (D. Del. 1963), *aff'd sub nom. Roman* v. *Sincock,* 377 U. S. 695 (1964), where the court stated that with the Delaware constitutional provisions relating to legislative reapportionment declared invalid, the Delaware legislature could "then proceed to pass an apportionment statute meeting the requirements of the Fourteenth Amendment . . . ." See 377 U. S., at 710-11.

Guntert was an original action submitted to the Supreme Court of Hawaii upon an agreed statement of facts in July, 1964. The plaintiffs in that suit sought to enjoin the conduct of any further elections of members of the Legislature under existing apportionment law on substantially the same grounds alleged by the plaintiffs in this proceeding. The hearing was directed essentially to the question whether the Supreme Court should enjoin the 1964 elections.

The court said that although it could assume the invalidity of the composition of the State Legislature in whole or in part, it would not interfere with the 1964 elections. *Cf. Reynolds* v. *Sims, supra,* at 585. Decision on all other matters was held in abeyance.[4]

The Hawaii Supreme Court did observe in dictum that, although the provision of the Hawaii Constitution to the effect that any constitutional amendment altering the basis of representation in the Senate required the approval of a majority of the votes upon the question in at least a majority of the counties of the State, was in itself unconstitutional, this fact did not "render invalid the requirement that the change [in the composition of the Senate] be by constitutional amendment." 47 Haw., at 668; 394 P. 2d, at 448. However, the Hawaii court expressly stated that, inasmuch as the matter of reapportionment was still in its early stages—the court's opinion was rendered the month after this Court's reapportionment decisions of June 1964—it was viewing the problem as merely one "of local law, not federal constitutional right." 47 Haw., at 667; 394 P. 2d, at 447. It indicated that under other circumstances, such as litigation pending for a more protracted

[4] Thereafter, the case was dismissed by stipulation of the parties.

period, considerations of the speedy effectuation of federal rights would also have to be taken into account. *Ibid.* See *Roman* v. *Sincock, supra,* at 711-12; *Maryland Committee* v. *Tawes, supra,* at 674.

And, most significantly, the Hawaii court made it perfectly plain that its dictum referred simply to a permanent plan of reapportionment and not to an interim reapportionment plan. The court's opinion, as to a temporary reapportionment plan, indicated clearly that it was of the view that both the judiciary and the State Legislature could adopt a temporary plan. The court, however, held that, on balance, no such effort needed to be made before the 1964 elections.[5]

The short of the matter is that not only did the Hawaii Supreme Court fail to deny the existence of legislative power in Hawaii to reapportion even on a permanent basis, but that it expressly recognized the Legislature's power to reapportion on a temporary basis.

2. *The order that a permanent reapportionment plan be put into effect before the 1966 general elections.*—The District Court's order of February 17, 1965, required that a constitutional convention be convened not later than October 15, 1965, and that amendments to the Hawaii Constitution proposed by the convention be submitted to the electorate at a special election to be held not later than January 30, 1966. In temporarily suspending that order through its March order, the District Court permitted the Legislature to propose a constitutional amendment but man-

[5] "We would not enjoin the holding of the 1964 elections under the existing apportionment unless prepared to supply a temporary reapportionment plan, if the legislature should not do so . . . ." 47 Haw., at 671, 394 P. 2d, at 449.

dated that it be submitted for popular ratification not later than at the November 1966 general election.[6] (R. 89-90) While, because of the stay of the coercive provisions of the District Court's order and the passage of time, the provisions as to a Fall 1965 constitutional convention have become moot, the District Court still has indicated that a permanent system of reapportionment must be put into effect by the November 1966 general elections, and presumably will implement this view on any remand of this case in the absence of a contrary ruling from this Court.

We submit that—presumably because of its belief that the Legislature had no power to adopt a provisional reapportionment plan—the District Court erred in ordering a permanent plan to be in effect by November 1966, and that this Court, on remand to the District Court, should make it clear that—particularly in view of the passage of time—this schedule should not be imposed in terms of a permanent plan.[7]

The Governor is definitely in accord with the basic wish of the District Court that the 1966 elections be conducted on a properly apportioned basis. His contention is that the Court erred in requiring this schedule in terms of a permanent plan. The parties' rights can adequately be protected, and a more orderly transition to a fair permanent plan take place, if the deadline for a permanent plan were deferred somewhat, and a provisional plan were adopted, either by the Legislature or the Court itself, to provide for

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[6] The order of April 28, 1965, withdrew that amendment and restored the original order. (R. 164; 240 F. Supp., at 732)

[7] Even if we are in error in our contention that the Hawaii Legislature has the power to provide a provisional reapportionment plan, it is indisputable that the District Court has the power to promulgate an interim plan on its own authority. *Reynolds* v. *Sims*, 377 U. S. 533, 586-87 (1964).

fair apportionment of the Legislature to be elected at the 1966 general election.—None of this Court's reapportionment decisions mandates or warrants the stringent time schedule imposed by the court below in terms of a *permanent* plan.

3. *The order requiring that a constitutional convention, rather than the Legislature, propose the permanent reapportionment amendment.*—Moreover, with a similar inflexibility, the District Court foreclosed one of the two methods provided in the Hawaii Constitution for the adoption of a permanent constitutional amendment providing for reapportionment. The Hawaii Constitution provides that constitutional amendments may be proposed to the electorate either (1) by a constitutional convention, or (2) by a two-thirds vote of each house of the Legislature at one session, or by a majority vote of each house of the Legislature at two successive regular sessions. Hawaii Const., Art. XV, Sections 2 and 3.

Presumably this ruling was caused by the court's failure to recognize the possibility of provisional reapportionment, which would result in a properly constituted Legislature which could propose a sound constitutional amendment through the legislative rather than the convention route. We know of no authority, and the District Court cited none, to the effect that it had the power to foreclose one of the methods, valid on its face, provided in the Constitution for the adoption of a permanent constitutional amendment providing for reapportionment.[8] In any event,

[8] We, of course, have no quarrel with the District Court's invalidation of that part of Article XV, Section 2, which provides that a constitutional amendment changing the apportionment in the Senate must be adopted by a majority of the electorate in each of a majority of the counties. But certainly the invalidity of that provision would not affect the validity of the two alternative means of *proposing* a constitutional amendment to the electorate set forth in Section 1 of the Article.

it would be more consonant with equitable considerations to permit the State to determine whether it should take the legislative or the convention path in proposing a permanent constitutional amendment, since, if an interim plan had been put into effect, justice would not be delayed.

4. *The order putting on a purely permissive basis a proper apportionment in the constitutional convention.*— In ordering the Legislature to provide for the calling of a constitutional convention, the District Court required the enactment of legislation providing for a special election to elect delegates to the convention "in the manner provided in the Constitution. Such legislation *may* include legislative action under Article XV, Section 2, 4th paragraph, of the Constitution." (R. 80; 238 F. Supp., at 479) (Emphasis supplied) That provision states that "unless the legislature shall otherwise provide, there shall be the same number of delegates to such convention, who shall be elected from the same areas . . . as required for the Hawaii State Constitutional Convention of 1950." The election of delegates to the convention of 1950 was conducted pursuant to Act 334, Session Laws of Hawaii 1949, which apportioned 63 seats among six representative districts. This Act allocated representation on a basis other than that of population.[9] Thus the District Court's order permits apportionment of the constitutional convention on a basis on which a State Legislature could not itself be validly apportioned.

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[9] The Act is set forth in Appendix A, p. 25a, *infra*. It distributed the delegates among the Representative Districts established under the Organic Act of 1900. See note 22, pp. 59-60, *supra*. Only thirty-six of the sixty-three delegates are allotted to Oahu through the formula provided in the Act, which is substantially inadequate either in terms of population or of registered voters. See p. 6, *supra*.

Whether or not the District Court was correct in making the constitutional convention route the only one by which a permanent reapportionment amendment might be proposed, we submit that its failure to order that any convention called to consider such an amendment be apportioned on a population basis was erroneous. *Cf. Maryland Committee* v. *Tawes, supra,* at 670; *WMCA, Inc.* v. *Lomenzo,* 377 U. S. 631, 652 (1964). A constitutional convention is a law-making body, responsible for framing or amending the basic, organic law of the state; its apportionment should certainly be tested by the same constitutional standards as that of a legislature. The organization of a constitutional convention on a malapportioned basis would hardly be an auspicious first step toward a permanent plan of proper legislative apportionment.[10]

Indeed, the District Court's mandate against legislative proposal of a constitutional amendment, and in favor of proposal through a convention, albeit a convention which might be malapportioned, could well produce paradoxical results. If, as we contend proper, an appropriate provisional plan of reapportionment were adopted and the 1966 general election held under it, the result should be a Legislature more properly apportioned than the convention provided for by the Hawaii Constitution. Yet, under the District Court's approach, initiation of the permanent constitutional amendment could not be made by the Legislature so apportioned but would be required to be made by the convention!

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[10] Clearly it is a different matter from saying that a malapportioned Legislature may itself legally adopt a reapportionment plan, if that plan were itself constitutional, to say that an entirely new legislative organ of government—a constitutional convention—should be permitted to be formed on a malapportioned basis.

5. *In view of the timing of its action, the District Court abused its discretion in imposing an injunction against legislation pending the adoption of a proper reapportionment plan.*—The District Court, on the 58th day of a 60-day legislative session, with all the basic legislation necessary for the orderly maintenance of the State's Government pending enactment (R. 170-176), abused its discretion in imposing an injunction against final adoption of general legislation until legislation looking toward reapportionment was adopted.[11] (R. 80, 164)—The immediate effects of this injunction were dissipated by the stay order which Mr. Justice Douglas signed on May 21, 1965.

It is unclear whether the coercive provisions of the District Court's order will run against the regular session of the Third State Legislature to be held commencing in February 1966, upon remand to the District Court following whatever disposition this Court makes of the substantive aspects of this litigation. The pertinent provisions of the order recited that: "This court will not interfere with the convening or conducting of the business of the Third State Legislature in regular session in 1965, save and except that the parties herein are hereby enjoined from taking final action upon any legislation . . . ." (R. 80; 238 F. Supp., at 479) It is not clear to what extent the injunctive terms of the order are limited by the reference to the 1965 session. Of course, in the event of the reversal of any part of the District Court's order of February 1965, presumably the District Court would reconsider its provisions as to remedies; and it might also do so if this Court should agree with

[11] Since the April 28, 1965, order abandoned any prospect of a provisional plan, its requirement on the Legislature was that it adopt legislation looking toward the calling of a constitutional convention.

us as to any of the contentions which we make in the earlier points of this subpart D as to remedies.

In any event, while the Governor did not take the point of view below that an injunction against legislation was *per se* an arbitrary and impermissible remedial measure, his position is that it may well become so if precipitately imposed at certain stages in the legislative session, as was the case in the 1965 session through the reimposition of the injunction on the 58th day of a 60-day regular session. While it is obviously impossible to forecast at what stage of the legislative session this case might be remanded to the District Court,[12] we respectfully suggest to the Court that it might be appropriate that its opinion disapprove any reimposition of such an injunction at a time when it would threaten the severe interference with the machinery of the state government which it did at the 1965 session. *Cf. Fortson* v. *Toombs,* 379 U. S. 621, 622 (1965).

II. THE DISTRICT COURT'S APRIL ORDER CORRECTLY DECLINED TO APPROVE THE LEGISLATURE'S PROPOSED REAPPORTIONMENT PLAN FOR THE SENATE

In its opinion and order of April 28, 1965, the District Court declined to approve a plan drawn by the Legislature to reapportion the Senate. In this part, on behalf of the Governor as appellee in Nos. 323 and 409, we defend this action of the court below.—The Legislature's Senate plan, in essence, took the form of two bills, a provisional reapportionment plan (H.B. 987, R. 113), and a constitutional amendment proposal (H.B. 773, R. 140). However, since the constitutional amendment proposal, which was in terms

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[12] The 1966 session will be a 30-day "budget session," commencing February 16, 1966. (The computation of days in a session excludes Sundays and holidays.) Hawaii Const., Art. III, § 11.

substantially similar to the provisional plan, did not pass the Legislature by a two-thirds majority in both houses, it could not amount to a valid constitutional amendment proposal until repassed at the next regular legislative session, a speculative possibility.[1]

The Legislature's Senate plan used the "registered voters" measure of representation. While (consistently with its approval of that method in the House) the District Court did not reject the plan on that basis, for the reasons stated in subpart B of Part I, pp. 42-70, *supra*, we urge that the Legislature's Senate plan could not be squared with the Equal Protection Clause for that reason, and that accordingly on that ground the District Court's order rejecting the plan should be affirmed.[2]

Moreover, the District Court was justified in rejecting the Senate plan on the basis of its use of arbitrary, multimember districts. The multimember districting system in the proposed Senate plan had, if anything, more weaknesses than the House multimember districting system and, of course, intensified the discriminations inherent in the House system. In any event, the District Court's order under which the Legislature acted provided that the Senate plan be submitted "to this court for approval" (R. 90), and H.B. 987, the provisional reapportionment legislation, the only one truly before the court, expressly stated that it would take effect only "upon approval . . . by the United States District Court for the District of Hawaii." (R. 117) Even if the deficiencies in the Legislature's pro-

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[1] The speculative nature of this possibility is accentuated by the fact that the bill passed the Senate only by a 13 to 12 vote. (R. 164)

[2] We develop some of the specifics of the discrepancies caused by the use of the "registered voters" measure in the Senate plan at pp. 71, 81, *supra*.

visional Senate plan did not rise to the level of a violation of the Constitution, the District Court, in view of the powers it had to fashion a remedy for the previous malapportionment by sanctioning a provisional plan, acted within its discretion in rejecting the Legislature's plan.

A. The Proposed Senate Plan's Arbitrary Construction of Multimember Districts Violated the Equal Protection Clause.

1. As developed in the Statement, pp. 17-18, *supra*, the proposed Senate plan constructed eight Senate districts among which 25 Senators were distributed.[3] Only one of the districts was a single-member district; one was a two-member district; two were three-member districts; and the remaining four (all on Oahu) were four-member districts. Citing the legislative history of the measure, the District Court found that the proposed Senate Districts were constructed basically by using existing Representative District boundaries. (R. 156, 160-61; 240 F. Supp., at 727-28, 730) Although the District Court recited that it had held the districting of the House to be constitutional, it observed that the Senate plan, instead of correcting the representational problems inherent in the House system, magnified them. It observed that one of the House districts was "too large" and that the result of imposition of the proposed Senatorial

[3] As we have indicated before (pp. 36-37; 39-40, *supra*), the District Court's order tended to freeze the number of Senators at 25. On a population basis, approximately 19 of these 25 Senators would have to come from Oahu. The effects of the Legislature's provisional Senate plan, in terms of the creation of large, multimember districts, were worst on Oahu, although the Legislature also turned the whole of the County of Hawaii into one multimember district in order to carry out what the District Court found to be a plan to protect incumbent Senators. (R. 163; 240 F. Supp., at 731) The consequences on Oahu are a vivid illustration, once again, of the inseverability of the whole of a scheme of legislative apportionment.

districts, which were larger than the Representative districts, was to create "monolithic political units." (R. 158, 160; 240 F. Supp., at 729-30)

The Court declined to find any rational basis for the construction of the Senatorial districts other than the use of the boundaries of the Representative districts.—As we have observed, these boundaries, in turn, are completely arbitrary. Indeed, on the basis of substantial evidence in the record (R. 302-03, 308-09, 311), the District Court affirmatively found that the use of multimember districts in the Senate was impelled by the desire of incumbent legislators to save their seats.[4] (R. 163; 240 F. Supp., at 731)

This arbitrariness, found by the District Court, when taken with the inevitable inequalities in representational power inherent in a variable multimember districting scheme (pp. 76-84, *supra*), amply supports the District Court's conclusion rejecting the plan. Indeed, four of the proposed Senate districts were each to elect 17% of the Senate; the District Court found that this would create "monoliths" effectively discriminating against persons in single-member and two-member districts. (R. 159-61; 240 F. Supp., at 729-30)

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[4] This was vividly illustrated in the situation in the County of Hawaii. There had historically been two Senatorial districts in this county. The tentative plan for Senate reapportionment proposed in March maintained this two-district system, allotting two Senators to East Hawaii and one Senator to West Hawaii. The April plan turned the County of Hawaii into a single, three-member Senate district. The Court found that the purpose was to protect seats of certain East Hawaii incumbents. (R. 163; 240 F. Supp., at 731)

As this Court indicated in *Reynolds* v. *Sims*, 377 U. S. 533, 581 (1964), arbitrary districting is an invitation to gerrymandering. District Courts have found gerrymandering to be the purpose of arbitrary districting schemes. *E.g.*, *Drew* v. *Scranton*, 229 F. Supp. 310, 326 (M. D. Pa. 1963), *remanded on other grounds*, 379 U. S. 40 (1964); *Sincock* v. *Duffy*, 215 F. Supp. 169, 188-89 (D. Del. 1963), *aff'd sub nom. Roman* v. *Sincock*, 377 U. S. 695 (1964).

Moreover, as the District Court also found, the effect of the Senate plan was to submerge minorities. The District Court pointed out the heterogeneity of some of the Representative Districts, intensified when separate districts containing diverse populations were combined by the Legislature to form Senatorial Districts. For instance, the proposed Fifth Senatorial District consisted of an area with a multitude of wealthy Caucasian widows and an area with a predominance of low-income Filipino males. The Seventh Senatorial District included "two clearly defined and geographically, economically and socially divided groups"—(1) "lower socioeconomic laborers" with a median family income of $3,000 in 1959; and (2) a group of "the highly professional and managerial class" with a median family income in 1959 of almost $16,000. (R. 158; 240 F. Supp., at 729)

The Court found that the Legislature had not considered equality of population among the districts or socioeconomic divergence within districts in creating the multimember districting plan. (R. 156; 240 F. Supp., at 727-28) It found that minority groups within some of the multimember districts would be effectively submerged by the plan and that persons in single-member districts would have less effective representation than those in monolithic multimember districts. (R. 158-61; 240 F. Supp., at 729-30)

2. The effect of the Senate plan, as the District Court rightly observed, was to intensify the problems inherent in the House plan. Even if the Senate plan could possibly have been appropriate for a unicameral legislature, it could not be considered appropriate as a second chamber to a House of Representatives apportioned as is Hawaii's, as

the District Court rightly concluded.[5] Indeed, this Court has never approved, even in dictum, a legislative apportionment scheme in which both houses of a legislature were districted on a multimember basis.[6]

Thus, the use of large, multimember districts in both houses compounds the problem of overrepresentation of those multimember districts. *Cf. Lucas* v. *Forty-Fourth General Assembly,* 377 U. S. 713, 735 (1964). Indeed, in two notorious cases recited by the District Court, a large, multimember Senate district was directly superimposed on a large, multimember House district in Oahu. Thus, the boundaries of the proposed Third Senatorial District and the Eighth Representative District were one and the same, and the district was to elect four Representatives and three Senators. The Sixth Senatorial District, as the District Court found, was constructed almost entirely from the Fifteenth Representative District, and, accordingly, the Fifteenth Representative District would dominate in the election of six Representatives and four Senators, on a general ticket basis, or approximately 13% overall of both chambers of the Legislature.

Moreover, a bicameral legislative scheme based solely on multimember districts might well be held to be uncon-

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[5] It is interesting to note that in its April 28 opinion the District Court recognized the proposition, taught by *Tawes,* that the constitutionality of one chamber of a bicameral legislature cannot be fairly considered in a vacuum, apart from the system of the other chamber. As we urge in subpart A of Part I, this was a reason why the District Court should never have affirmatively upheld the constitutionality of the House.

[6] In fact, in *Mann* v. *Davis,* 245 F. Supp. 241 (E. D. Va. 1965), *aff'd sub nom. Burnette* v. *Davis,* Nos. 241, 424, O. T. 1965, October 25, 1965, it was indicated that any inequities caused by a multimember districting system might be offset by a different districting scheme in the other legislative house.

stitutional *per se* because of the fact that it precludes the possibility of any minority representation within the legislative scheme. In a bicameral system with only one multi-member house, minorities may have some hope of representation in the other house. They have no such hope in a legislature both houses of which are elected from multi-member districts.

Such is certainly the case under the proposed Senate plan. As the court below found, districting under that plan was dependent on the previously existing Representative District boundaries. Thus, as developed above, the boundaries of two of the eight proposed Senate districts (both on Oahu) are coterminous, or nearly coterminous, with those of single Representative Districts. Other proposed Senatorial Districts were nearly coterminous with two or more Representative Districts. (R. 300-01)

The District Court held that not only was the proposed Senate districting arbitrary, as is pointed out above, but that the discrimination against minority groups in the multimember districts which is inherent in the House scheme would be intensified intolerably by apportioning members of both houses among the same or similar districts. Minorities within the Third and Sixth Senatorial Districts would never have an opportunity to be represented at all within Hawaii's Legislature. They would be effectively deprived of any voice in the choice of legislators. (R. 159-61; 240 F. Supp., at 729-30)

The Court thus correctly held that the proposed Senate scheme had to be considered in the light of the existing House plan. Moreover, the Court was correct in insisting that the two houses of a bicameral legislature must complement one another, by compensating for inequalities of representation inherent in the apportionment plan of the other,

and must not instead intensify existing inequalities. The Court well said:

> "There can be no truly representative government without a system of apportionment which provides potentially equal representation to the divergent factors incorporated within the body politic. Our own representative form of government demands checks and balances, devices and procedures to channel the many and diverse interests of the people into the making of a stream of legislation that produces for each person in that state the maximum beneficence possible.
>
> "In reapportioning and redistricting the senate, both houses overlooked the fact that, to be valid, the makeup of the senate must positively complement the makeup of the house, to provide the vital equality of voter representation. Both houses of the legislature seemingly forgot that the schemes of districting *each* house, when conjoined, must offer compensating advantages to the voters—not only to those voters within each representative district, be it senate or house, but to all voters throughout the State. While there perforce must be some overlap of representation with the several senate and house districts, that overlap must not be such as to concentrate and intensify the voting power of a single senatorial-representative district to the point that the voters therein have a built-in disproportionate representational advantage over any other voters of the State." (R. 158-59; 240 F. Supp., at 729)

The lack of complementary factors may result in invidious discriminations, not obvious when the apportionment of only one of the houses is improperly viewed in a vacuum, by intensifying discriminations inherent in single-

house apportionment. The District Court properly found that the conjunction of the existing House districting and the proposed Senate districting did result in invidious discrimination.

B. Even if the Provisional Senate Plan Had Not Been Violative of the Fourteenth Amendment, the District Court's Refusal to Approve It Should Be Sustained.

Even if multimember districting schemes, and the Hawaii scheme in particular, were not violative of the Fourteenth Amendment, they would be hardly appropriate in terms of affording proper representation. They denigrate the principle of majority rule, the theory that a constituency should be able to maintain effective control over its representative, and the ideal of a legislature as a microcosm of the society, reflecting its range of views and interests. Moreover, they create administrative difficulties, including numerous candidates and long ballots, which tend to hinder informed and efficient selection of representatives.[7]

As we have noted, the order of the District Court under which the Legislature's provisional plan for the Senate was submitted required that that plan be "approved" by the District Court, and the Legislature's Senate provisional plan provided that it should not go into effect without that approval.[8]—The Legislature's provisional plan for the

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[7] This Court has referred to a multimember districting scheme as "an extremely objectionable feature" of an apportionment plan. *Lucas* v. *Forty-Fourth General Assembly*, 377 U. S. 713, 726 n. 13, 731-32 (1964).

[8] The permanent plan proposed as a constitutional amendment by H. B. 773 contained no such provision. However, that House bill was insufficient to propose the constitutional amendment, inasmuch as it had not passed the Legislature by a two-thirds vote. Hawaii Const., Art. XV, Section 3. Although it had rejected the provisional plan contained in H. B. 987, the District Court declared

Senate, of course, was one which had had to win the approval of the very Senate which the District Court had held to be improperly constituted.

The District Court's disapproval, on the grounds stated in its opinion, is sustainable even if those grounds do not constitute a violation of the Fourteenth Amendment. The District Court has a broad power to fashion a remedy for previous unconstitutional state action. In *Fortson* v. *Toombs*, 379 U. S. 621 (1965), this Court stressed the "wide range" of discretion possessed by a district court in fashioning decrees to remedy malapportionment. The District Court could have fashioned and executed a reapportionment of the Senate itself, although it acted wisely in deferring doing so until plans had been submitted to it by the Legislature;[9] if it had not deferred, the court would have had to make determinations not dictated by the Constitution.

But in any approach, it was the court's duty to guarantee equality as well as it could in order to dissipate the effects of the previous malapportionment.[10] Indeed, the District Court had a duty to scrutinize with particular care the provisional plan proposed by the Legislature—containing as one chamber the very Senate which had been held improperly constituted—to see that the plan did not, for that reason, enshrine the results of the prior unconstitutional organization of the Senate.

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that "we . . . do not find it necessary to consider the validity" of H. B. 773. (R. 164-65; 240 F. Supp., at 742)

[9] See *e.g.*, *Davis* v. *Mann*, 377 U. S. 678, 693 (1964); *Reynolds* v. *Sims*, 377 U. S. 533, 586 (1964).

[10] On the powers of courts of equity completely and broadly to remedy the results of illegal action, see *e.g.*, *United States* v. *First Nat'l City Bank*, 379 U. S. 378 (1965); *May Department Stores Co.* v. *NLRB*, 326 U. S. 376, 390-91 (1946).

The Court could have adopted or rejected a plan offered to it by a private party, or could have adopted its own plan, as we have developed. That the provisional plan was drawn up by the Legislature and approved by majority vote in no way limits the Court's power to remedy the existing malapportionment by requiring a greater equality of representation than the minimal constitutional standards require. This is particularly the case when one of the methods provided in the Hawaii Constitution for the constitutional amendment which presumably would provide a permanent reapportionment plan is initiation by the Legislature. Certainly a Legislature elected under a provisional plan which might initiate such a constitutional amendment should be elected under a system which thoroughly dissipated the effects of the prior malapportionment.[11]

CONCLUSION

For the reasons stated, paragraphs 1, 2, 3 and 4 of the decision and order of the District Court dated February 17, 1965, should be reversed, except insofar as they invalidated the provisions of Article III, Section 2, of the Hawaii State Constitution fixing the number of Senators per Senatorial district and the provisions of Article XV, Section 2, of that Constitution pertaining to constitutional amendments affecting representation in the Senate; and the deci-

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[11] We recognize that this element could not have entered into the District Court's thinking because it precluded—as we contend erroneously—the legislative initiation of a constitutional amendment. (See subpart D, part I, pp. 86-90, *supra.*) Nonetheless, we submit that this is an appropriate matter for this Court to consider on review of the District Court's rejection of the Senate plan.

sion and order of the District Court dated April 28, 1965, insofar as it rejected the Legislature's proposed Senate plan, should be affirmed.

Respectfully submitted,

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APPENDICES

APPENDIX A

Constitutional and Statutory Provisions

1. U. S. Constitution, Amendment XIV, Section 1

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Article III of the Constitution of the State of Hawaii

THE LEGISLATURE

SECTION 1. The legislative power of the State shall be vested in a legislature, which shall consist of two houses, a senate and a house of representatives. Such power shall extend to all rightful subjects of legislation not inconsistent wtih this constitution or the Constitution of the United States.

SECTION 2. The senate shall be composed of twenty-five members, who shall be elected by the qualified voters of the respective senatorial districts. The districts, and the number of senators to be elected from each, shall be as follows:

First senatorial district: that portion of the island of Hawaii known as Puna, Hilo and Hamakua, five;

Second senatorial district: that portion of the island of Hawaii known as Kau, Kona and Kohala, two;

Third senatorial district: the islands of Maui, Molokai, Lanai and Kahoolawe, five;

Fourth senatorial district: that portion of the island of Oahu lying east and south of Nuuanu Street and Pali Road and the upper ridge of the Koolau Range from the Nuuanu Pali to Makapuu Point and all other islands not specifically enumerated, five;

Fifth senatorial district: that portion of the island of Oahu lying west and north of the fourth senatorial district, five; and

Sixth senatorial district: the islands of Kauai and Niihau, three.

SECTION 3. The house of representatives shall be composed of fifty-one members, who shall be elected by the qualified voters of the respective representative districts. Until the next reapportionment, the representative districts and the number of representatives to be elected from each shall be as set forth in the Schedule.

SECTION 4. On or before June 1 of the year 1959, and of each tenth year thereafter, the governor shall reapportion the members of the house of representatives in the following manner: The total number of representatives shall first be reapportioned among four basic areas, namely, (1) the island of Hawaii, (2) the islands of Maui, Molokai, Lanai and Kahoolawe, (3) the island of Oahu and all other islands not specifically enumerated, and (4) the islands of Kauai and Niihau, on the basis of the number of voters

registered at the last preceding general election in each of such basic areas and computed by the method known as the method of equal proportions, no basic area to receive less than one member. Upon the determination of the total number of representatives to which each basic area is entitled, such total shall be reapportioned among the one or more representative districts within each basic area on the basis of the number of voters registered at the last preceding general election within each of such representative districts and computed by the method known as the method of equal proportions, no representative district to receive less than one member. Upon any reapportionment, should the total number of voters registered in any representative district be less than one-half of the quotient obtained by dividing the total number of voters registered in the State by the total number of members to which the house is entitled, then, as part of such reapportionment, the basic area within which such representative district lies shall be redistricted by the governor in such manner that the total number of voters registered in each new representative district therein shall be more than one-half of such quotient.

The governor shall thereupon issue a proclamation showing the results of such reapportionment, and such reapportionment shall be effective for the election of members to such house for the next five succeeding legislatures.

Original jurisdiction is hereby vested in the supreme court of the State to be exercised on the application of any registered voter, made within thirty days following the date specified above, to compel, by mandamus or otherwise, the governor to perform the above duty; and made within thirty days following the date of such proclamation, to compel, by mandamus or otherwise, the correction of any error made in such reapportionment.

SECTION 5. The members of the legislature shall be elected at general elections. The term of office of members of the house of representatives shall be two years beginning with their election and ending on the day of the next general election, and the term of office of members of the senate shall be four years beginning with their election and ending on the day of the second general election after their election.

* * *

SECTION 11. Regular sessions of the legislature shall be held annually. The governor may convene the legislature, or the senate alone, in special session. All sessions shall be held at the capital of the State. In case the capital shall be unsafe, the governor may direct that any session shall be held at some other place. Regular sessions in odd numbered years shall be known as "general sessions" and regular sessions in even numbered years shall be known as "budget sessions".

* * *

Regular sessions shall commence at 10:00 o'clock a.m., on the third Wednesday in February. General sessions shall be limited to a period of sixty days and budget sessions and special sessions to a period of thirty days, but the governor may extend any session for not more than thirty days. Sundays and holidays shall be excluded in computing the number of days of any session.

3. Article XV of the Constitution of the State of Hawaii

REVISION AND AMENDMENT

SECTION 1. Revisions of or amendments to this constitution may be proposed by constitutional convention or by the legislature.

SECTION 2. The legislature may submit to the electorate at any general or special election the question, "Shall there be a convention to propose a revision of or amendments to the Constitution?" If any ten-year period shall elapse during which the question shall not have been submitted, the lieutenant governor shall certify the question, to be voted on at the first general election following the expiration of such period.

If a majority of the ballots cast upon such question be in the affirmative, delegates to the convention shall be chosen at the next regular election unless the legislature shall provide for the election of delegates at a special election.

Notwithstanding any provision in this constitution to the contrary, other than Section 3 of Article XIV, any qualified voter of the district concerned shall be eligible to membership in the convention.

Unless the legislature shall otherwise provide, there shall be the same number of delegates to such convention, who shall be elected from the same areas, and the convention shall be convened in the same manner, as nearly as practicable, as required for the Hawaii State Constitutional Convention of 1950.

The convention shall determine its own organization and rules of procedure. It shall be the sole judge of the elections, returns and qualifications of its members and, by a two-thirds vote, may suspend or remove any member for cause. The governor shall fill any vacancy by appointment of a qualified voter from the district concerned.

The convention shall provide for the time and manner in which the proposed constitutional revision or amendments shall be submitted to a vote of the electorate, but no such revision or amendments shall be effective unless approved at a general election by a majority of all of the votes tallied

upon the question, such majority constituting at least thirty-five percent of the total vote cast at such election, or at a special election by a majority of the total vote tallied upon such question, such majority constituting at least thirty-five percent of the total number of registered voters; provided, that no constitutional amendment altering this proviso or the representation from any senatorial district in the senate shall become effective unless it shall also be approved by a majority of the votes tallied upon the question in each of a majority of the counties.

The provisions of this section shall be self-executing, but the legislature shall make the necessary appropriations and may enact legislation to facilitate their operation.

SECTION 3. The legislature may propose amendments to the constitution by adopting the same, in the manner required for legislation, by a two-thirds vote of each house on final reading at any session, after either or both houses shall have given the governor at least ten days' written notice of the final form of the proposed amendment, or, with or without such notice, by a majority vote of each house on final reading at each of two successive sessions.

Upon such adoption, the proposed amendments shall be entered upon the journals, with the ayes and noes, and published once in each of four successive weeks in at least one newspaper of general circulation in each senatorial district wherein such a newspaper is published, within the two months' period immediately preceding the next general election.

At such general election the proposed amendments shall be submitted to the electorate for approval or rejection upon a separate ballot.

The conditions of and requirements for ratification of such proposed amendments shall be the same as provided

in Section 2 of this article for ratification at a general election.

SECTION 4. No proposal for amendment of the constitution adopted in either manner provided by this article shall be subject to veto by the governor.

4. Article XVI of the Constitution of the State of Hawaii

SCHEDULE

Representative Districts

SECTION 1. As provided in Section 3 of Article III until the next reapportionment, the representative districts and the number of members to be elected from each shall be as follows:

First representative district: that portion of the island of Hawaii known as Puna, one representative;

Second representative district: that portion of the island of Hawaii known as South Hilo, four representatives;

Third representative district: that portion of the island of Hawaii known as North Hilo and Hamakua, one representative;

Fourth representative district: that portion of the island of Hawaii known as Kau and South Kona and that portion of North Kona, for convenience herein referred to as Keauhou, more particularly described as follows: from a point at the seashore between the lands of Holualoa 1 and 2 and Puapuaa 2 running northeasterly along the boundary of Holualoa 1 and 2 to Puu Laalaau; (2) easterly in a straight line to a point called "Naohueelleua" being the

common corner of the lands of Puuanahulu, Kaohe and Keauhou 2nd; (3) southeasterly along the common boundary between Hamakua and North Kona districts to the summit of Mauna Loa; (4) westerly along the common boundary between Kau and North Kona districts to the easterly boundary of South Kona district; (5) northerly and westerly along the boundary between North and South Kona districts to the seashore; and (6) northerly along the seashore to the point of beginning, one representative;

Fifth representative district: that portion of the island of Hawaii known as Kohala and that portion of North Kona not included in the fourth representative district, one representative;

Sixth representative district: the islands of Mologai and Lanai, one representative;

Seventh representative district: the islands of Maui and Kahoolawe, five representatives;

Eighth representative district: that portion of the island of Oahu known as Koolaupoko and Koolauloa, two representatives;

Ninth representative district: that portion of the island of Oahu, for convenience herein referred to as Waialua and Wahiawa and a portion of Ewa known as Kunia and Waipio, more particularly described as follows: Beginning at the seashore on the boundary between the Ahupuaas of Waimea and Pupukea and following along the North boundary of the Ahupuaa of Waimea to Puu Kainapuaa on the Koolau Range at the junction of the Ahupuaas of Laie, Waimea and Kawailoa, thence southeasterly along the top of the Koolau Range, passing over Puu Pauao and Puu

Kaaumakua to the head of Kipapa Gulch, thence down along Kipapa Gulch in all its turnings and windings to Waiahole Ditch, thence southwesterly along Waiahole Ditch in all its turnings and windings to Reservoir No. 31 of the Oahu Sugar Company, thence following a direct line to Puu Palikea on the Waianae Mountain Range, thence northwesterly following along the top of Waianae Mountain Range, passing over Puu Kaua, Puu Kanehoa, Puu Hapapa, Puu Kumakalii, Puu Kalena, Puu Kaala to Puu Pueo, thence westerly along the boundary between the Ahupuaas of Kaena and Keawaula to the seashore at Kaena Point, thence easterly along the seashore to the point of beginning, two representatives;*

Tenth representative district: that portion of the island of Oahu, for convenience herein referred to as Ewa, (excluding Kunia and Waipio) and Waianae, more particularly described as follows: Beginning at the seashore at Kaena Point, on the boundary between the Ahupuaas of Kaena and Keawaula, and following along said boundary to Puu Pueo on the Waianae Mountain Range, thence southeasterly along the top of the Waianae Mountain Range, passing over Puu Kaala, Puu Kalena, Puu Kumakalii, Puu Hapapa, Puu Kanehoa, Puu Kaua to Puu Palikea, thence following a direct line to Reservoir No. 31 of the Oahu Sugar Company, thence northeasterly along Waiahole Ditch in all its turnings and windings to Kipapa Gulch, thence up along Kipapa Gulch in all its turnings and windings to the top of the Koolau Range, thence southeasterly along the top of the Koolau Range to the boundary between the Ahupuaas of

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* The boundaries of the Ninth and Tenth representative districts were changed by amendments proposed by the Legislature and ratified by the electorate in 1962. The descriptions of both districts are shown above in their amended form.

Halawa and Moanalua, thence southwesterly along the boundary between the Ahupuaas of Halawa and Moanalua to the seashore, thence westerly along the seashore to the point of beginning, two representatives;*

Eleventh representative district: that portion of the island of Oahu, for convenience herein referred to as Kalihi, more particularly described as follows: from the intersection of Kalihi and Auiki Streets running westerly along Auiki Street to Mokauea Street; (2) southwesterly along Mokauea Street Extension extended to a point on the outer edge of the reef; (3) westerly along the outer edge of the reef to a point on the Moanalua-Halawa boundary; (4) northerly and northeasterly along the Moanalua-Halawa boundary to the top of Koolau Range; (5) southeasterly along the top of Koolau Range to a place called "Puu Lanihuli"; (6) southwesterly along the top of the ridge between the lands of Kalihi, Kapalama and Nuuanu to Kalihi Street; and (7) southwesterly along Kalihi Street to the point of beginning, three representatives;

Twelfth representative district: that portion of the island of Oahu, for convenience herein referred to as upper Nuuanu, more particularly described as follows: from the intersection of King and Kalihi Streets running northeasterly along Kalihi Street to the ridge between the lands of Kalihi, Kapalama and Nuuanu; (2) northeasterly along the top of said ridge to a point on the Koolau Range called "Puu Lanihuli"; (3) easterly along the top of said Range to Pali Road at the Nuuanu Pali; (4) southwesterly along Pali Road to Nuuanu Avenue and southwesterly along

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* The boundaries of the Ninth and Tenth representative districts were changed by amendments proposed by the Legislature and ratified by the electorate in 1962. The descriptions of both districts are shown above in their amended form.

Nuuanu Avenue to School Street; (5) northwesterly along School Street to the center line of the Kapalama Drainage Canal (Waikiki Branch); (6) southwesterly along said Canal to the center line of the main Kapalama Drainage Canal; (7) southwesterly along said Canal to King Street; and (8) northwesterly along King Street to the point of beginning, three representatives;

Thirteenth representative district: that portion of the island of Oahu, for convenience herein referred to as Kapalama, more particularly described as follows: from the junction of the Honolulu Harbor Channel and the reef running westerly along the outer edge of the reef to Mokauea Street Extension extended; (2) northeasterly along Mokauea Street Extension extended to Sand Island Road; (3) northeasterly along Mokauea Street Extension to Auiki Street; (4) easterly along Auiki Street to Kalihi Street; (5) northeasterly along Kalihi Street to King Street; (6) southeasterly along King Street to the center line of the main Kapalama Drainage Canal; (7) northerly along said Canal to the center line of the Kapalama Drainage Canal (Waikiki Branch); (8) northeasterly along said Canal to School Street; (9) southeasterly along School Street to Nuuanu Avenue; (10) southwesterly along Nuuanu Avenue to the sea; and (11) southwesterly along the middle of Honolulu Harbor and Honolulu Harbor Channel to the point of beginning, three representatives;

Fourteenth representative district: that portion of the island of Oahu, for convenience herein referred to as Pauoa, more particularly described as follows: from the junction of the Honolulu Harbor Channel and the outer edge of the reef running northeasterly along the middle of Honolulu Harbor Channel and Honolulu Harbor to the

intersection of Queen Street and Nuuanu Avenue; (2) northeasterly along Nuuanu Avenue to Pali Road and northeasterly along Pali Road to the top of the Koolau Range at the Nuuanu Pali; (3) easterly and southerly along the top of the Koolau Range to a point called "Puu Konahuanui"; (4) southwesterly along the top of the ridge between the lands of Nuuanu, Pauoa and Manoa to a mountain peak called "Puu Ohia" or "Tantalus"; (5) southwesterly along the top of the ridge between the lands of Makiki and Kalawahine to the intersection of Nehoa Street and Lewalani Drive; (6) southerly along Lewalani Drive and Piikoi Street to Wilder Avenue; (7) easterly along Wilder Avenue to Punahou Street; (8) southerly along Punahou Street to King Street; (9) westerly along King Street to Kalakaua Avenue; (10) southerly along Kalakaua Avenue to the center line of the Ala Wai Canal; (11) westerly along said Canal and along the line of said Canal extended to the outer edge of the reef; and (12) westerly along the outer edge of the reef to the point of beginning. five representatives;

Fifteenth representative district: that portion of the island of Oahu, for convenience herein referred to as Manoa and Waikiki, more particularly described as follows: from the intersection of Kalakaua Avenue and the center line of the Ala Wai Canal running northerly along Kalakaua Avenue to King Street; (2) easterly along King Street to Punahou Street; (3) northerly along Punahou Street to Wilder Avenue; (4) westerly along Wilder Avenue to Piikoi Street; (5) northerly along Piikoi Street to Lewalani Drive; (6) northerly along Lewalani Drive to Nehoa Street; (7) northeasterly along the top of the ridge between the lands of Makiki and Kalawahine to a mountain peak called "Puu Ohia" or "Tantalus"; (8) northeasterly along

the top of the ridge between the lands of Pauoa, Manoa and Muuanu to a point on the Koolau Range called "Puu Konahuanui"; (9) southeasterly along the top of said Range to a place called "Mt. Olympus"; (10) southwesterly along the top of Waahila Ridge to the top edge of Palolo Valley; (11) southwesterly along the top edge of said Valley to the forest reserve boundary; (12) southwesterly along the southeasterly boundary of St. Louis Heights Tract, Series 2 (File Plan 464) to the southerly boundary of said Tract 100 feet southeasterly from Alencastre Street; (13) southwesterly parallel to and 100 feet from Alencastre Street and St. Louis Drive to Waialae Avenue; (14) westerly along Waialae Avenue to Kapahulu Avenue extended; (15) southerly across Waialae Avenue and along Kapahulu Avenue to Kalakaua Avenue; (16) westerly along Kapahulu Avenue extended to the outer edge of the reef; (17) northwesterly along the outer edge of the reef to a point on the line extended of the center line of the Ala Wai Canal; and (18) easterly along said line to the point of beginning, six representatives;

Sixteenth representative district: that portion of the island of Oahu, for convenience herein referred to as Kaimuki and Kapahulu, more particularly described as follows: from a point at the seacoast at a place called "Black Point" running westerly along the seacoast to Kapahula Avenue extended to the sea; (2) easterly across Kalakaua Avenue and easterly and northerly along Kapahula Avenue to Waialae Avenue; (3) easterly along Waialae Avenue to a point 100 feet easterly of St. Louis Drive; (4) northeasterly across Waialae Avenue then parallel to and 100 feet from St. Louis Drive and Alencastre Street to the southerly boundary of St. Louis Heights Tract, Series 2 (File Plan No. 464); (5) northeasterly along the

southeasterly boundary of said Tract to the forest reserve boundary; (6) northeasterly along the top ridge of Palolo Valley to the top of Waahila Ridge; (7) northeasterly along the top of Waahila Ridge to a point on Koolau Range called "Mt. Olympus"; (8) easterly along the top of the Koolau Range to the top of the ridge between the lands of Waialae Nui and Palolo; (9) southwesterly along the top of said ridge to a place called "Kalepeamoa"; (10) southwesterly along Mauumae Ridge to Sierra Drive; (11) southwesterly along Sierra Drive to Waialae Avenue; (12) easterly along Waialae Avenue to 13th Avenue; (13) southwesterly along 13th Avenue and Ocean View Drive to Kilauea Avenue; (14) westerly along Kilauea Avenue to Makapuu Avenue; (15) southwesterly along Makapuu Avenue to Diamond Head Road; and (16) southeasterly along Diamond Head Road to the Military Road and along the Military Road extended to the point of beginning, four representatives;

Seventeenth representative district: that portion of the island of Oahu not included in any other representative district on the island of Oahu, together with all other islands not included in any other representative district, three representatives;

Eighteenth representative district: the islands of Kauai and Niihau, four representatives.

Wherever a roadway, or the intersection of one or more roadways, is designated as a boundary in any of the above descriptions, the center line of such roadway or intersection is intended as such boundary.

5. Hawaii House Bill No. 987, 3d Legislature (1965)

SECTION 1. *Senate; Districts; Composition.* The Senate shall be composed of twenty-five members, who shall be elected by the qualified voters of the respective senatorial districts. Until the next reapportionment, the senatorial districts, and the number of senators to be elected from each, shall be as follows:

"Senate; Districts; Composition

Section 2. The Senate shall be composed of twenty-five members, who shall be elected by the qualified voters of the respective senatorial districts. Until the next reapportionment, the senatorial districts, and the number of senators to be elected from each, shall be as follows:

First senatorial district: the island of Hawaii, three;

Second senatorial district: the islands of Maui, Molokai, Lanai and Kahoolawe, two;

Third senatorial district: that portion of the island of Oahu consisting of the eighth representative district as described in the Schedule, Article XVI, Section 1, of the Constitution of the State of Hawaii, as amended, three;

Fourth senatorial district: that portion of the island of Oahu consisting of the ninth and tenth representative districts as described in the said Schedule and the first and the eighth precincts of the eleventh representative district as described in the governor's proclamation issued September 11, 1964, for the 1964 general election, four;

Fifth senatorial district: that portion of the island of Oahu consisting of the twelfth and thirteenth representative districts as described in the said Schedule and the second through seventh precincts, inclusive, and the ninth through twelfth precincts, inclusive, of the eleventh representative district, and the first through fifth precincts, inclusive, and the eighth, eleventh, fifteenth and sixteenth precincts of the fourteenth representative district as described in the said proclamation, four;

Sixth senatorial district: that portion of the island of Oahu consisting of the fifteenth representative district as described in the said Schedule and the sixth, seventh, ninth and tenth precincts and the twelfth through fourteenth precincts inclusive, of the fourteenth representative district as described in the said proclamation, four;

Seventh senatorial district: that portion of the island of Oahu consisting of the sixteenth and seventeenth representative districts as described in the said Schedule, four;

Eighth senatorial district: the islands of Kauai and Niihau, one."

SECTION 2. On or before June 1, of the year 1975, and of each tenth year thereafter, the governor shall reapportion the members of the senate in the following manner: The total number of senators shall first be reapportioned among four basic areas, namely, (1) the island of Hawaii, (2) the islands of Maui, Molokai, Lanai and Kahoolawe, (3) the island of Oahu and all other islands not specifically enumerated, and (4) the islands of Kauai and Niihau on the basis of the number of voters registered at the last preceding general election in each of such basic areas and

computed by the method known as the method of equal proportions, no basic area to receive less than one member. Upon the determination of the total number of senators to which each basic area is entitled, such total shall be reapportioned among the one or more senatorial districts within each basic area on the basis of the number of voters registered at the last preceding general election within each of such senatorial districts and computed by the method known as the method of equal proportions, no senatorial district to receive less than one member. Upon any reapportionment, should the total number of voters registered in any senatorial district be less than one-half of the quotient obtained by dividing the total number of voters registered in the State by the total number of members to which the senate is entitled, then, as part of such reapportionment, the basic area within which such senatorial district lies shall be redictricted by the governor in such manner that the total number of voters registered in each new senatorial district therein shall be more than one-half of such quotient, provided, however, that there shall be at least one senatorial district in each basic area.

Upon completion of the reapportionment of the senate as provided herein, the governor shall issue a proclamation showing the results thereof.

Except as otherwise provided hereinafter, the initial reapportionment shall be effective for the election of members to the senate in 1976 and shall remain in effect for succeeding senatorial elections until the next reapportionment takes effect. Except as otherwise provided hereinafter, any subsequent reapportionment shall be effective for the election of members to the senate in the year next following such reapportionment and shall remain in effect for succeeding senatorial elections until the next reapportionment takes effect.

An incumbent senator whose term of office does not expire until the second general election following the date of the proclamation, including any such senator whose seat has been apportioned to another district by reapportionment, shall be allowed to complete his four-year term; provided that when the seat of such holdover senator has been reapportioned to another district, the election to fill the new seat in the district to which such seat has been newly apportioned shall not be held until the time of the second election following such proclamation.

Original jurisdiction is hereby vested in the supreme court of the State to be exercised on the application of any registered voter, made within thirty days following the date specified above, to compel, by mandamus or otherwise, the governor to perform the above duty; and made within thirty days following the date of such proclamation, to compel, by mandamus or otherwise, the correction of any error made in such reapportionment.

SECTION 3. The terms of all members of the senate elected or appointed prior to the general election of 1966 shall terminate on the date of the general election of 1966.

Members of the senate elected at the general election of 1966 shall be divided into two classes.

Members of the first class shall hold office for a term of four years beginning with their election and ending on the day of the second general election held thereafter.

Members of the second class shall hold office for a term of two years beginning with their election and ending on the day of the next general election held thereafter.

Upon the expiration of the aforesaid terms of office of members of the respective classes, the term of office of their successors shall be four years.

Of the members to which each senatorial district is entitled, one-half shall be members of the second class.

If the total number of senators to which a senatorial district is entitled is not an even number, the number of members of the first class in such district shall be the quotient of said total number divided by two, rounded off to the next whole number. The remainder shall be members of the second class. Membership in the first and second classes shall be determined by the number of votes cast for each senator in such district. The first class shall consist of those senators, in number corresponding with the number of members of the first class to which such district is entitled, who are elected with the highest number of votes from such district. The remaining senators elected shall constitute the second class.

The senator from a senatorial district that is entitled to one senator shall automatically be a member of the first class.

SECTION 4. This Act shall take effect upon approval by the Governor of the State of Hawaii and by the United States District Court for the District of Hawaii and shall remain in effect until superseded by constitutional amendment; provided that the regular election of 1966, shall be the first election held pursuant to the provisions herein.

6. Hawaii House Bill No. 773, 3d Legislature (1965)

SECTION 1. Article III, Section 2 of the Constitution of the State of Hawaii shall be amended to read as follows:

"Senate; Districts; Composition

Section 2. The Senate shall be composed of twenty-five members, who shall be elected by the qualified voters of the respective senatorial districts. Until the next reapportionment, the senatorial districts, and the

number of senators to be elected from each, shall be as follows:

First senatorial district: the island of Hawaii, three;

Second senatorial district: the islands of Maui, Molokai, Lanai and Kahoolawe, two;

Third senatorial district: that portion of the island of Oahu consisting of the eighth representative district as described in the Schedule, Article XVI, Section 1, of the Constitution of the State of Hawaii, as amended, three;

Fourth senatorial district: that portion of the island of Oahu consisting of the ninth and tenth representative districts as described in the said Schedule and the first and the eighth precincts of the eleventh representative district as described in the governor's proclamation issued September 11, 1964, for the 1964 general election, four;

Fifth senatorial district: that portion of the island of Oahu consisting of the twelfth and thirteenth representative districts as described in the said Schedule and the second through seventh precincts, inclusive, and the ninth through twelfth precincts, inclusive, of the eleventh representative district, and the first through fifth precincts, inclusive, and the eighth, eleventh, fifteenth and sixteenth precincts of the fourteenth representative district as described in the said proclamation, four;

Sixth senatorial district: that portion of the island of Oahu consisting of the fifteenth representative district as described in the said Schedule and the sixth, seventh, ninth and tenth precincts and the twelfth through fourteenth precincts, inclusive, of the four-

teenth representative district as described in the said proclamation, four;

Seventh senatorial district: that portion of the island of Oahu consisting of the sixteenth and seventeenth representative districts as described in the said Schedule, four;

Eighth senatorial district: the islands of Kauai and Niihau, one."

SECTION 2. Article III of the Constitution of the State of Hawaii shall be amended by adding thereto a new section, to be designated "Section 2.1" next following Section 2 thereof, to read as follows:

"Reapportionment of Senate

Section 2.1. On or before June 1 of the year 1975, and of each tenth year thereafter, the governor shall reapportion the members of the senate in the following manner: the total number of senators shall first be reapportioned among four basic areas, namely, (1) the island of Hawaii, (2) the islands of Maui, Molokai, Lanai and Kahoolawe, (3) the island of Oahu and all other islands not specifically enumerated, and (4) the islands of Kauai and Niihau, on the basis of the number of voters registered at the last preceding general election in each of such basic areas and computed by the method known as the method of equal proportions, no basic area to receive less than one member. Upon the determination of the total number of senators to which each basic area is entitled, such total shall be reapportioned among the one or more senatorial districts within each basic area on the basis of the number of voters registered at the last preceding general election within each of such senatorial districts and com-

puted by the method known as the method of equal proportions, no senatorial district to receive less than one member. Upon any reapportionment, should the total number of voters registered in any senatorial district be less than one-half of the quotient obtained by dividing the total number of voters registered in the State by the total number of members to which the senate is entitled, then, as part of such reapportionment, the basic area within which such senatorial district lies shall be redistricted by the governor in such manner that the total number of voters registered in each new senatorial district therein shall be more than one-half of such quotient, provided, however, that there shall be at least one senatorial district in each basic area.

Upon completion of the reapportionment of the senate as provided herein, the governor shall issue a proclamation showing the results thereof.

Except as otherwise provided hereinafter, the initial reapportionment shall be effective for the election of members to the senate in 1976 and shall remain in effect for succeeding senatorial elections until the next reapportionment takes effect. Except as otherwise provided hereinafter, any subsequent reapportionment shall be effective for the election of members to the senate in the year next following such reapportionment and shall remain in effect for succeeding senatorial elections until the next reapportionment takes effect.

An incumbent senator whose term of office does not expire until the second general election following the date of the proclamation, including any such senator whose seat has been apportioned to another district by reapportionment, shall be allowed to complete his four-year term; provided that when the seat of such

holdover senator has been reapportioned to another district, the election to fill the new seat in the district to which such seat has been newly apportioned shall not be held until the time of the second election following such proclamation.

Original jurisdiction is hereby vested in the supreme court of the State to be exercised on the application of any registered voter, made within thirty days following the date specified above, to compel, by mandamus or otherwise, the governor to perform the above duty and made within thirty days following the date of such proclamation, to compel, by mandamus or otherwise, the correction of any error made in such reapportionment."

SECTION 3. Article III, Section 5, of the Constitution of the State of Hawaii shall be amended by substituting a semicolon for the period at the end of the second sentence thereof and adding the following thereafter:

"provided that members of the senate elected at the general election of 1966 shall be divided into two classes. Members of the first class shall hold office for a term of four years beginning with their election and ending on the day of the second general election held thereafter. Members of the second class shall hold office for a term of two years beginning with their election and ending on the day of the next general election held thereafter. Upon the expiration of the aforesaid terms of office of members of the respective classes, the term of office of their successors shall be four years. Of the members to which each senatorial district is entitled, one-half shall be members of the second class. If the total number of senators to which a senatorial district is entitled is not an even number,

the number of members of the first class in such district shall be the quotient of said total number divided by two, rounded off to the next whole number. The remainder shall be members of the second class. Membership in the first and second classes shall be determined by the number of votes cast for each senator in such district. The first class shall consist of those senators, in number corresponding with the number of members of the first class to which such district is entitled, who are elected with the highest number of votes from such district. The remaining senators elected shall constitute the second class. The senator from a senatorial district that is entitled to one senator shall automatically be a member of the first class."

SECTION 4. Article XV, Section 2, of the Constitution of the State of Hawaii shall be amended by substituting a period for the semicolon in the sixth paragraph thereof and by deleting from the sixth paragraph the proviso at the end of said paragraph, which reads:

"provided, that no constitutional amendment altering this proviso or the representation from any senatorial district in the senate shall become effective unless it shall also be approved by a majority of the votes tallied upon the question in each of a majority of the counties."

SECTION 5. The foregoing amendments shall take effect upon compliance with the provisions of Article XV, Section 3, of the Constitution of the State of Hawaii; provided that the proviso now in Article XV, Section 2, paragraph 6, shall not be applicable.

7. Act 334 of the Session Laws of Hawaii, Regular Session of 1949

SECTION 1. In order that Hawaii may be admitted in the Union on an equal footing with the original states, a convention for the purpose of forming a constitution and state government and otherwise preparing for such admission as a state shall be held, and the acts of said convention shall be submitted for ratification by the people, as provided in this Act.

For the purposes of this Act and the carrying out of its provisions:

(a) The limits of the proposed state shall be taken to be the area now constituting this Territory, as at present described.

(b) The laws of the proposed state at the time of its admission into the Union shall be deemed to comprise all laws then in force in the Territory of Hawaii, except as modified or changed by the constitution of the state or by ordinance of the constitutional convention duly ratified by the people, or by any Act of the Congress of the United States providing for the admission of said state.

SECTION 2. All citizens of the United States who have the qualifications for voters for representatives to the Territorial Legislature are hereby authorized to vote for and choose delegates to the convention. Such delegates shall possess the qualifications of such electors.

The convention shall consist of sixty-three delegates apportioned among the representative districts within the limits of the proposed state on the following basis:

First representative district, two delegates at large and in addition thereto one delegate each from precincts com-

bined as follows: Precincts 1, 2, 3, 4, 5, 6, 7, and 36; precincts 8, 9, 10, 11, and 35; precincts 12, 13, 14, and 33; precincts 15, 16, 30, 17, and 34; precincts 18, 19, 20, 21, 31, and 22; precincts 23, 32, 24, 25, 26, 27, 28, and 29;

Second representative district, two delegates at large and in addition thereto one delegate each from precincts combined as follows: Precincts 1, 2, 3, 4, 5, 6, 7, 8, and 16; precincts 9, 10, 11, 12, 13, 14, and 15;

Third representative district, three delegates at large and in addition thereto one delegate each from precincts combined as follows: Precincts 1, 2, 3, 4, and 5; precincts 6, 7, 8, 10, and 11; precincts 9, 12, 13, and 28; precincts 14, 15, 16, and 17; precincts 18, 19, 20, 21, 22, 23, 24, 25, 26, and 27; precincts 29, 30, 31, 32, 33, and 34;

Fourth representative district, which for all purposes of this section shall exclude precincts 28 and 38 thereof, six delegates at large and in addition thereto two delegates each from precincts combined as follows: Precincts 25, 26, 27, 23, 22, 21, 20, and 19; precincts 24, 16, 15, 32, 17, 18, and 11; precincts 6, 36, 14, 13, 12, and 7; precincts 35, 5, 34, 31, and 8; precincts 4, 30, 33, 3, 9, and 10; precincts 1, 2, 29, and 37;

Fifth representative district, which for all purposes of this section shall include precincts 28 and 38 of the fourth district, six delegates at large and in addition thereto two delegates each from precincts combined as follows: Precincts 28 and 38, fourth district, and precincts 1, 2, 3, and 4, fifth district; precincts 5, 7, 30, and 31, fifth district; precincts 6, 29, 8, 9, 10, and 32, fifth district; precincts 11, 26, 14, 15, 16, 12, 13, and 33; precincts 18, 19, 20, 21, and 27, fifth district; precincts 17, 28, 22, 23, 24, and 25, fifth district;

Sixth representative district, two delegates at large and in addition thereto one delegate each from precincts combined as follows: Precincts 1, 2, 3, and 4; precincts 5 and 6; precincts 8, 9, 10, and 11; and one delegate from precinct 7.

The precincts herein mentioned are as they existed on November 2, 1948.

APPENDIX B

Memorandum to Judge Pence from Judge Beeks

MEMORANDUM

TO: Judge Pence DATE: March 31, 1965

FROM: Judge Beeks

SUBJECT: *Holt* v. *Richardson*

I discussed your proposed Decision and Order on Senate Reapportionment Plan of March 18, 1965, and your notes accompanying the same, in a telephone conference with Judge Jertberg on March 29th. Judge Jertberg, because of the fact that he was in Los Angeles without a secretary, asked me to convey to you our joint views, which are as follows:

1. Inasmuch as the Senate Reapportionment Plan of March 18, 1965, is not formally before us, we do not think that any decision and order should be filed because such decision and order would be purely advisory in nature.

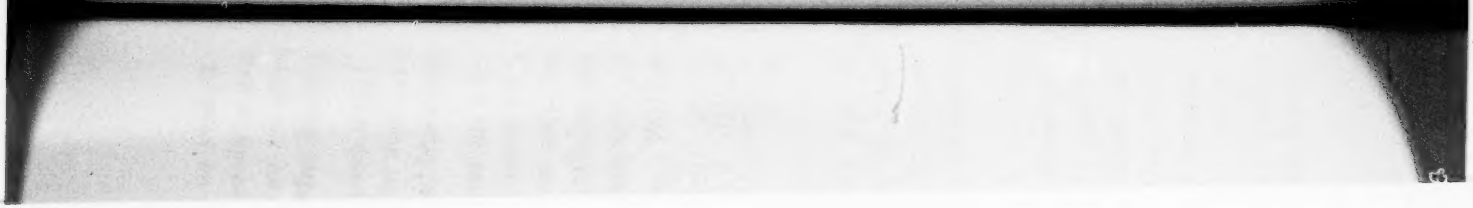
2. We believe that the Senate should be redistricted into single senatorial districts, although we may approve two-member districts if and only if the legislature can affirmatively show substantial reasons therefor. There may very well be valid reasons for one or two 2-member districts in the neighboring islands but we perceive no justification whatsoever for other than single member districts on the Island of Oahu, particularly the heavily populated areas thereof.

We have no objection whatsoever to your making our views, as above expressed, informally known to all of the parties but we are opposed to the entry of a written decision and order.

I again discussed this matter with Judge Jertberg, who is now back in Fresno, this morning, read him this memorandum and he signified his approval and concurrence.

It is our suggestion that you discuss the subject matter of this memorandum with counsel for all parties immediately upon receipt of same (I hope you receive it tomorrow) and thereafter arrange a conference call with both of us (Judge Jertberg will be in Fresno) at noon your time on Friday.

cc: Judge Jertberg
Fresno, Calif.



MOTION FILED

JAN 17 1966

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

Nos. 318, 323 and 409

JOHN A. BURNS, Governor of the State of Hawaii, *Appellant,*

—v.—

WILLIAM S. RICHARDSON, *et al.,* *Appellees.*

ELMER F. CRAVALHO, *et al.,* *Appellants,*

—v.—

WILLIAM S. RICHARDSON, *et al.,* *Appellees.*

KAZUHISA ABE, *et al.,* *Appellants,*

—v.—

WILLIAM S. RICHARDSON, *et al.,* *Appellees.*

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

HAROLD S. ROBERTS
Petitioner

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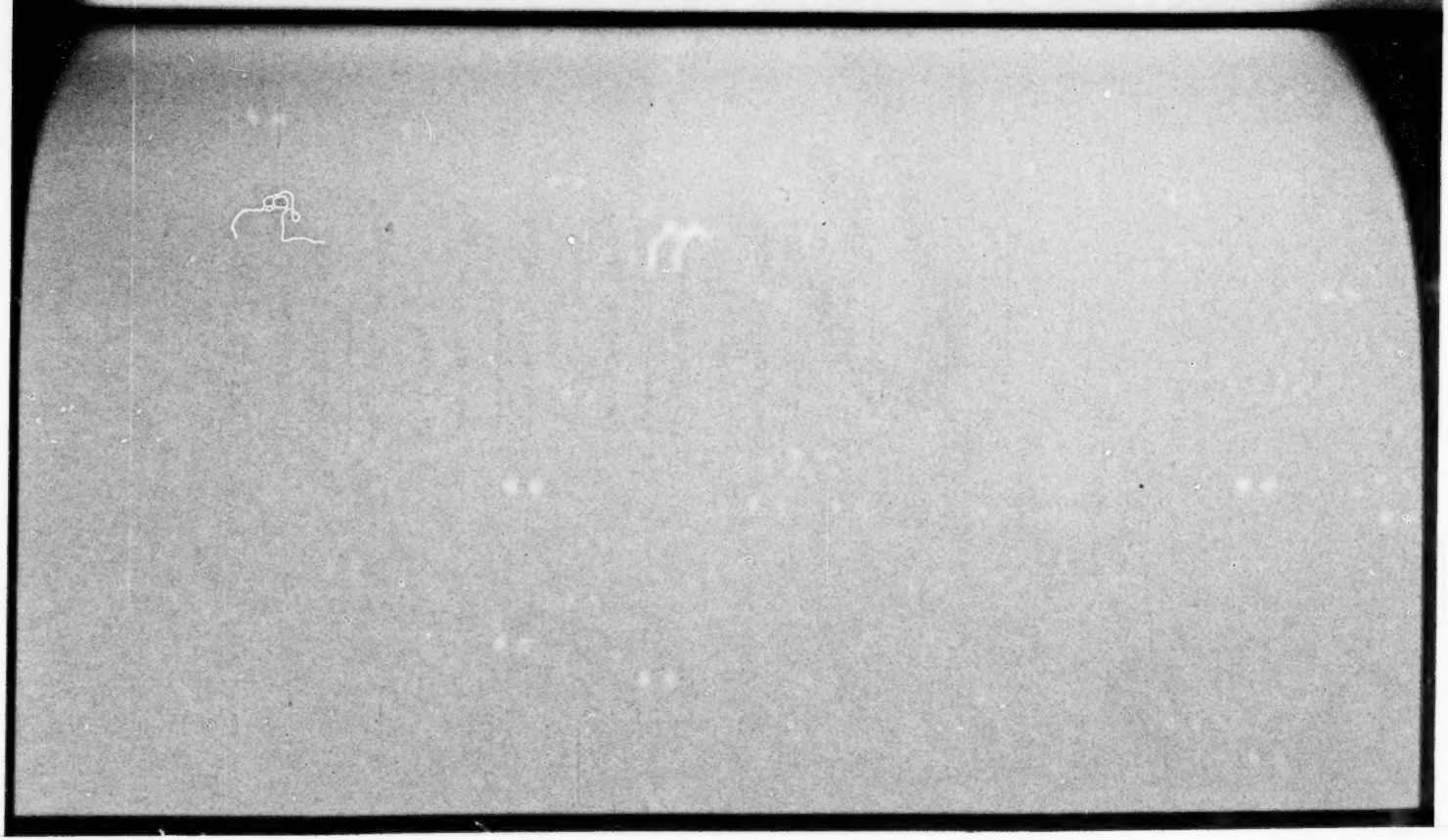
Counsel

January 1966



IN THE

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OCTOBER TERM, 1965

Nos. 318, 323 and 409

JOHN A. BURNS, Governor of the State of Hawaii,

Appellant,

—v.—

WILLIAM S. RICHARDSON, *et al.*,

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Appellants,

—v.—

WILLIAM S. RICHARDSON, *et al.*,

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KAZUHISA ABE, *et al.*,

Appellants,

—v.—

WILLIAM S. RICHARDSON, *et al.*,

Appellees.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

To the Honorable, Chief Justice and Associate Justices of the Supreme Court of the United States:

HAROLD S. ROBERTS, Petitioner, respectfully represents that:

(1) The Court, by Order dated October 11, 1965, granted Petitioner's motion for leave to file a brief as amicus curiae in Nos. 318 and 323 --

a Brief in Opposition to Jurisdictional Statements of Appellants. The original petition did not include No. 409 since the Senate brief had not been filed as of the date of petitioner's motion.

(2) In the Motion, Petitioner showed that he: was and for 18 years had been a citizen and taxpayer of the State of Hawaii and resided in Honolulu, Hawaii; was a delegate to the Constitutional Convention of 1950, which drafted the Constitution adopted by the people of Hawaii and now in effect; helped compile the proceedings thereof and wrote its preface; has been actively interested in the reapportionment problems of Hawaii and was called as a witness before both the Senate and the House, each in Committee of the Whole, during the Special Session of the Legislature of Hawaii in July 1964 when it was considering the reapportionment problems involved in this litigation.

(He testified before the House of Representatives, pre-session hearings, July 20, 1964; Senate pre-session hearings, July 21, 1964; House of Representatives hearings, July 27, 1964 on House Bills 2, 3 & 4; House of Representatives hearings, August 7, 1964 on House Bills 5 & 6; Senate

hearings, July 28, 1964 on Criteria for Reapportionment and the Role of the Constitutional Convention; Senate hearings, July 29, 1964 on S.B. 10 and S.B. 12; Senate hearings, August 5, 1964 on Unicameralism and Bicameralism; and before the Senate Judiciary Committee on May 3, 1965 on S.B. 475, S.B. 745, and H.B. 677,699, 894 and 936.)

(3) He has written a number of articles on Hawaii's Constitution published in the Christian Science Monitor, the National Municipal Review and State Government. His testimony on State Reapportionment was published in the Hearings before Congress in 1959 and the Honolulu Advertiser has published a series of 10 articles on Hawaii's Reapportionment problems written by him (May 19-30, 1965). A brochure by Petitioner on Reapportionment in Hawaii to be issued by a Political Science unit on the University Campus will be published in January 1966.

(4) There is a substantial question relating to the effect of the decision of the Hawaii State Supreme Court (Guntert v. Richardson, July 27, 1964)which has been disregarded by Appellants.

(5) He believes that the issues in this case will not be presented in an adversary manner.

(6) He also believes that appeal from the February 17, 1965 order of the District Court, except for point 4 dealing with a reapportionment plan for the Senate, was not timely or properly filed.

(7) He requested counsel for the (appellant) Governor, by his own counsel, to consent to the filing of a brief amicus curiae, and appellant Governor refused consent.

Wherefore, the petitioner prays that he be permitted to file the brief amicus curiae, submitted herewith and this Court make such other orders as it deems appropriate to render a judgment in accordance with the Constitution of the United States and the Constitution of the State of Hawaii.

Respectfully submitted,

HAROLD S. ROBERTS
Petitioner

RICHARD K. SHARPLESS
Counsel

January 1966

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

Nos. 318, 323 and 409

JOHN A. BURNS, Governor of the State of Hawaii, *Appellant,*

—v.—

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KAZUHISA ABE, *et al.,* *Appellants,*

—v.—

WILLIAM S. RICHARDSON, *et al.,* *Appellees.*

ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

BRIEF FOR ELMER F. CRAVALHO, *ET AL.*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

Nos. 318, 323 and 409

JOHN A. BURNS, Governor of the State of Hawaii,
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WILLIAM S. RICHARDSON, *et al.*,
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WILLIAM S. RICHARDSON, *et al.*,
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ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

BRIEF FOR ELMER F. CRAVALHO, *ET AL.*

OPINIONS BELOW

The opinion of the District Court dated February 17, 1965 (R. 62-81) is reported at 238 F. Supp 468. Its opinion dated April 28, 1965 (R. 151-65) is reported at 240 F. Supp. 724.

JURISDICTION

This action was brought under 42 U.S.C. §§ 1983, 1988, 28 U.S.C. § 1343 and 28 U.S.C. §§ 2201, 2202 for a declaration of the invalidity and for preliminary and permanent injunction to enjoin the enforcement of the provisions of the Constitution of the State of Hawaii relating to the apportionment of the Senate and House of Representatives of the Hawaii Legislature on the ground of their repugnancy to the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. (R. 1-29)

The District Court's first order dated February 17, 1965, was entered April 9, 1965. The second order was dated and entered April 28, 1965. The second order reinstated certain provisions of the first order, which in the interim had been temporarily suspended.

Elmer F. Cravalho, *et al.*, filed their Notice of Appeal on May 7, 1965. (R. 184-87)

The Supreme Court of the United States has jurisdiction to review the orders on direct appeal under 28 U.S.C. §§ 1253 and 2101 (b).

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

1. Amendment XIV, Section 1, Constitution of the United States.

2. Article III, Sections 1, 2, 3, 4, 5, and 11, of the Consti-

tution of the State of Hawaii, Revised Laws of Hawaii 1955 (1963 Supp.), p. 10 *et seq.*, relating to the apportionment of the Hawaii Senate and House of Representatives and the sessions of the Hawaii Legislature.

3. Article XVI, Section 1, of the Constitution of the State of Hawaii, Revised Laws of Hawaii 1955 (1963 Supp.), p. 22 *et seq.*, which sets forth a schedule of the representative districts and the number of representatives to be elected from each district.

4. Article XV of the Constitution of the State of Hawaii, Revised Laws of Hawaii 1955 (1963 Supp.), p. 21 *et seq.*, relating to the methods of revision and amendment of the Hawaii Constitution.

5. Act 281, Regular Session 1965, Third Legislature of the State of Hawaii, which is the Hawaii Senate Reapportionment Plan. (R. 113-18)

The above are set forth in Appendix A, pp. 1a-20a.

QUESTIONS PRESENTED

1. Does the Equal Protection Clause necessarily require that the Hawaii Senate be apportioned in accord with a rule of single-member districts, where the House of Representatives, with single-member and multi-member districts, has been found to be constitutionally apportioned, so that the Legislature would have the burden of justifying that a total apportionment scheme with multi-member districts in both houses does not operate to minimize or to cancel out the voting strength of political, social, economic, or racial elements of the voting population and the burden of justifying that the two houses complement each other in accord with the United States Constitution?

2. Does the fact that the geographical boundaries of certain districts of one house of a bicameral legislature of the State of Hawaii are identical to, or coincide to a great degree with, the geographical boundaries of certain districts of the other house violate the Equal Protection Clause?

3. Should this Court vacate the District Court's injunction against the legislators from enacting any legislation until legislation looking toward the convening of a constitutional convention to propose amendments to the Hawaii Constitution (to be then submitted to the electorate) effecting reapportionment of the Senate, has been passed?

4. Where certain provisions of the Hawaii Constitution relating to the apportionment of the Hawaii Senate are invalid, does the Legislature of the State of Hawaii have the authority to enact at least temporary reapportionment legislation relating to the Hawaii Senate, pending the adoption of valid amendments to the Hawaii Constitution providing for the reapportionment of the Hawaii Senate in accord with the United States Constitution?[1]

5. Does the reapportionment plan for the Hawaii Senate which the Legislature of the State of Hawaii submitted to the District Court on April 14, 1965, pursuant to the order of the District Court, violate the Equal Protection Clause?

STATEMENT OF THE CASE

The case was instituted in the United States District Court for the District of Hawaii under 42 U.S.C. §§ 1983, 1988, 28 U.S.C. § 1343 and 28 U.S.C. §§ 2201, 2202 by Complaint filed on August 13, 1964, by the original plaintiffs

---

[1] With respect to this question Elmer F. Cravalho, *et al.*, agree with the argument of Governor John A. Burns, in his Brief, pp. 86-90. (References to the Governor's Brief are hereafter "Gov. ")

Henrietta Davidson Holt, *et al.*, as citizens, taxpayers and electors of the State of Hawaii, on their behalf and on behalf of others. (R. 1-29) The Complaint sought a declaratory order that Sections 2, 3 and 4 of Article III, Section 1 of Article XVI, and the proviso at the end of the sixth paragraph in Section 2 of Article XV of the Hawaii Constitution which dealt with the apportionment of the Hawaii Legislature had deprived and continued to deprive the complaining citizens of liberty and property without due process of law and of the equal protection of the laws, all in violation of the Fourteenth Amendment of the United States Constitution. (R. 11)

The Complaint also sought an injunction against the Lieutenant Governor of the State of Hawaii, the officer charged with the responsibility for supervision of State elections, prohibiting him from proceeding with the 1964 general election until such time as the Hawaii Legislature had been reapportioned to the satisfaction of the District Court. (R. 11-12) Failing satisfactory reapportionment through the efforts of the Legislature itself, the Complaint requested that the District Court undertake to reapportion the Legislature. (R. 13)

On August 24, 1964, John A. Burns, Governor of the State of Hawaii, (appellant in No. 318) intervened as intervenor-plaintiff, (R. 37-41) and Nelson K. Doi, *et al.*, (now Kazuhisa Abe, *et al.*, appellants in No. 409) being certain State senators, intervened as party defendants. (R. 42-48)

On that same day Elmer F. Cravalho, *et al.*, (appellants in No. 323) being certain members of the Hawaii House of Representatives, intervened in the case below as party defendants, with a view to making the position of the House known to the District Court and facilitating the reapportionment. (R. 49-53)

On August 26, 1964, a three-judge court, convened pur-

suant to 28 U.S.C. § 2281 *et seq.*, denied the prayer of the plaintiffs Henrietta Davidson Holt, *et al.*, to enjoin the conduct of the 1964 election for State legislative offices, and the District Court thereafter held a full hearing on the Complaint in January, 1965.

On February 17, 1965, the District Court filed its Order, entered April 9, 1965, adjudging those certain provisions of Article III, Section 2 of the Hawaii Constitution fixing the number of senators per senatorial district and the said proviso of Article XV, Section 2 relating to the amendments affecting representation in the Senate were unconstitutional and invalid (R. 79; 238 F. Supp., at 478) and also holding that any change in the representation from any Hawaii senatorial district must be by constitutional amendment and not by statute. (R. 78; 238 F. Supp., at 478) The Order also denied the prayer of the Governor to enjoin the 1966 election but provided, in lieu thereof, relief prompting reapportionment by enjoining the legislators, including Elmer F. Cravalho, *et al.*, from enacting any legislation until legislation pursuant to the provisions of Article XV of the Hawaii Constitution providing for the submission to the people of Hawaii by special election to be held not later than August 1, 1965, the question: "Shall there be a convention to propose a revision of or amendments to the constitution?", and for any and all acts required by law to implement such legislation, has been enacted into law. (R. 80; 238 F. Supp., at 479)

On March 1, 1965 Elmer F. Cravalho, *et al.*, and Nelson K. Doi, *et al.*, (now Kazuhisa Abe, *et al.*) through counsel jointly filed a motion to alter or amend judgment to allow the Hawaii Legislature to propose and submit to the District Court for its approval a reapportionment plan of the Hawaii Senate providing thereby an opportunity to avoid the costly and circuitous route of accomplishing reapportionment at a

constitutional convention. (R. 82-88) The court below granted the said motion and by Order of March 9, 1965, entered March 19, 1965, provisionally amended Paragraph 4 of its Order of February 17, 1965 (which had not at that time been entered) to permit the Legislature (a) to enact a provisional reapportionment and redistricting plan for the Senate; (b) to adopt a proposed constitutional amendment embodying pertinent provisions of the foregoing reapportionment and redistricting plan for submission to the electorate at the 1966 general election; and (c) to enact legislation to submit to the electorate the question: Shall there be a convention to propose a revision of or amendments to the constitution? This Order, like the one of February 17th, demanded that the plan be approved by the District Court; failing approval, the Order of February 17th demanding legislation for implementing a constitutional convention would again become effective. (R. 88-91)

On March 18, 1965, the Legislature advised the District Court that a provisional reapportionment and redistricting plan for the Senate, in substance approved by both Houses, was then in conference committee and about ready to be presented to the District Court, whereby the Senate was reapportioned by dividing the State into the same original and existing six senatorial districts, changing only the number of senators allocated to each district, based upon the use of the method of equal proportions. (R. 153-54; 240 F. Supp., at 726) By that March 18th plan, the senators were apportioned as follows: (R. 154; 240 F. Supp., at 726)

County	Senatorial District	No. of Senators
Hawaii	First	2
"	Second	1
Maui	Third	2
Oahu	Fourth	9
"	Fifth	10
Kauai	Sixth	1

The Legislature quickly thereafter was informally made to understand by the District Court that such a grossly lumpy apportionment of senators, whereby forty per cent of the entire Senate would come from one senatorial district and thirty-six per cent from another alongside, could never be approved, and the plan was forthwith withdrawn from conference committee for reconsideration by the House. (R. 154; 240 F. Supp., at 726) Shortly thereafter, the District Court informally indicated that because Hawaii had a multi-member district House, the District Court would require a rule of single-member districts for the Senate so that any other than single-member senatorial districting would have to be justified to the District Court. (R. 154; 240 F. Supp., at 726) And in its Decision and Order of April 28, 1965, the District Court below ultimately decided that this rule of single-member districts was the "means by which the Senate could be apportioned to give to every voter the equal protection and equal representation that he is entitled to without disturbing the makeup of the house." (R. 162; 240 F. Supp., at 731)

1. The Proposed Provisional Plan

Pursuant to the Order of March 9, 1965, entered March 19, 1965, and after the informal advice of the District Court with respect to the March 18th plan and the rule of single-member districts for the Senate, the Legislature, on April 14, 1965, passed and sent to the District Court the following bills: (a) H. B. 987,[2] the proposed provisional senatorial

[2] The provisional senatorial reapportionment plan (H. B. 987) was passed by both houses of the Hawaii Legislature and submitted to the Governor of Hawaii for approval. The Governor neither approved nor vetoed the bill within the period provided in the Hawaii Constitution. Therefore, on July 26, 1965, the bill became law without the Governor's signature. Act 281, Regular Session 1965, Third Legislature of the State of Hawaii. (Appendix A, pp. 15a-20a)

reapportionment plan; (b) H. B. 773, the proposed constitutional amendment embodying that same plan; and (c) H. B. 986, submitting to the electorate in the 1966 general election the question of the calling of a constitutional convention. (R. 103-04) By H. B. 987, the State was divided into eight senatorial districts, *viz.:* (R. 120-21, 154; 240 F. Supp., at 727)

County	Senatorial District	No. of Senators	1964 Registered Voters per District
Hawaii	First	3	28,130
Maui	Second	2	18,786
Honolulu	Third	3	27,073
"	Fourth	4	35,780
"	Fifth	4	39,361
"	Sixth	4	40,629
"	Seventh	4	37,336
Kauai	Eighth	1	12,266

The reports of the conference committee on the proposed provisional plan (H. B. 987), as well as the proposed plan for the constitutional amendment (H. B. 773) embodying the same setting forth the conference committee's reasons for redistricting the Senate on a multi-member district basis were also presented. (R. 105-11, 119-29)

Substantially all the evidence concerning the proposed provisional plan (H. B. 987) were covered by the report of the conference committee which considered and reported the bill out, the testimony of Sakae Takahashi and the testimony of Robert Schmitt.

a. The Conference Committee Report

The conference committee report on H. B. 987[3] covering the proposed provisional senatorial reapportionment plan

[3] The conference committee report on H. B. 987 incorporates the conference committee report on H. B. 773. (R. 111)

(hereinafter called the "Senate plan") set forth the bases and considerations on which the Senate plan was founded. (R. 123-28) According to the conference committee report, the committee first determined against a single-member districts rule in favor of multi-member districts because of its deep concern that single-member districts have a tendency to foster primary concern with local issues and to "fragment the approach to statewide problems and programs... to the detriment of the State as a whole." (R. 123) The committee believed that multi-member districts would provide a means toward "increasing the significance of an individual's vote by focusing the individual's attention on a broad spectrum of major community problems as opposed to those of more limited and local concerns." (R. 124) The committee's preference for multi-member districts was in part also prompted by history and tradition of a member of the House having a shorter term, representing a smaller constituency and being of a numerically larger body than a member of the Senate, and this experience had proved a desirable balance and "meaningful in achieving the concept of bicameralism initially sought by the constitutional convention." (R. 123) It recognized the probability of significant population shifts suggested by the rapid development of residential subdivisions on the island of Oahu which shifts in turn would necessitate more frequent reapportionment and readjustments of district lines in the case of single-member districts. (R. 125) It felt that too large a number of senators from one district or too large a number of vacancies to be filled in the same election from one district might confuse and make difficult intelligent voter selection (R. 124), but also felt that two-member districts for Oahu would not alleviate the worries of single-member districts and that three-member districts ought to be avoided because the districts would then approach the population and geographical

sizes of the House representative districts, a similarity which may have a negative effect on the complexion of bicameralism. (R. 127-28)

In the formulation of the Senate plan the committee attempted to "apportion one senator to every 9,500 registered voters." (R. 126) Aside from numerical parity, the district lines of the first, second and eighth senatorial districts corresponded to and maintained the boundaries of the existing counties of Hawaii, Maui and Kauai.[4] (R. 125) The recognition of the counties was intended to "assure some voice to the counties as political subdivisions" inasmuch as they had been historically administered separately and were physically insulated from each other. (R. 125) The county and island of Hawaii which heretofore was composed of two senatorial districts was made into one senatorial district "prompted in large part to equalize the registered voter population of that island with the districts on Oahu to the extent possible." (R. 127)

With respect to the City and County of Honolulu (island of Oahu), numerical parity of one senator to every 9,500 registered voters was again the equal population standard. (R. 126) In drawing the district lines, the committee "relied very heavily on the standards of compactness and contiguity." (R. 126) The Koolau Mountain Range determined the boundaries of the third senatorial district, being all of the "windward side" of Oahu. (R. 126) Although the boundaries of the third senatorial district coincided with the eighth representative district, the committee believed that

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[4] Hawaii county is made up of the island of Hawaii; Maui county is made up of four islands in close proximity being the islands of Maui, Molokai, Lanai and Kahoolawe; Kauai county is made up of two islands in close proximity being the islands of Kauai and Niihau; and the City and County of Honolulu is made up of the island of Oahu.

the well-defined geographical separation by the Koolau Mountain Range was controlling in this instance. (R. 126) The fourth senatorial district was generally made up of the "leeward side." (R. 126) The fifth, sixth and seventh senatorial districts were bounded by "lines running from the Koolau Range to the ocean along well-defined and long established representative district and precinct lines." (R. 126) Although cognizant of the widest disparity between the fourth senatorial district, entitled to four senators, with 35,780 registered voters (8,945 per senator) and the sixth senatorial district, entitled to four senators, with 40,629 registered voters (10,157 per senator), the committee elected not to favor the cause of arithmetical consistency over compactness, contiguity and community of interest as it would have "meant the splitting of the heart of the Kalihi community and adding a portion thereof to the leeward Oahu communities which are geographically removed from and foreign to Kalihi." (R. 126-27)

The committee believed that the bases applied in the reapportionment and redistricting scheme under the Senate plan achieved districts "as nearly of equal population as is practicable" and provided "fair and effective representation to all citizens." (R. 128)

b. Testimony of Sakae Takahashi

Sakae Takahashi, a Hawaii State senator and vice-president of the Hawaii Senate and chairman of the senate judiciary committee, served as chairman of the conference committee which considered the Senate plan. (R. 293-94) He testified as a member of the conference committee to explain and amplify the reasons for the actions of the committee. (R. 294)

Senator Takahashi testified in favor of the Senate plan.

(R. 306) In addition to the clarification of the matters set forth in the committee report, he stated that the committee did not discuss the complete redistricting of the House to make the House single-member districts (R. 297), nor discuss the fact that there were multi-member districts in the House. (R. 298) Discussion, if any, in this respect was that the "House districting plan would be left alone." (R. 311) The position taken by the committee was that there was "nothing wrong with having multi-member districts in the Senate and multi-member districts in the House." (R. 298)

Senator Takahashi also identified the residences of Senators Esposito, Porteus and Fukushima within the fifteenth representative district (R. 302-03) and delineated also the residences of Senators Ariyoshi, Kido and Takahashi within the twelfth representative district (R. 308) and the residences of Senators Hulten and Pryor within the eighth representative district. (R. 308-09)

c. Testimony of Robert Schmitt

Robert Schmitt, statistician, (R. 201) testified that the number of senators apportioned to the several senatorial districts on the basis of the 1964 registered voters under the Senate plan was correctly computed under the method of equal proportions. (R. 317) His opinion was that "on the basis of substantial equality of the number of registered voters, on the use of long standing statistical and taxation and land division boundaries, on contiguity and compactness, the districts seemed to be well thought out." (R. 317) More specifically as to certain district lines he commented as follows:

Third senatorial district—"the windward side consisting of Koolauloa and Koolaupoko judicial districts has

formed a unit since earliest antiquity;" (R. 321) "has long been used for statistical analysis . . . [and] happens to be consistent to the 9th Tax Zone on this island" [Oahu]. (R. 321)

Fourth senatorial district—"the breakdown between the 4th and 5th Senatorial Districts, which runs between Fort Shafter and Kalihi, is also a long-standing boundary." (R. 321) "[We] have defined here in the 4th District an area of community of interest, of similar occupational background, that is, largely Armed Forces and their dependents, plus many civilian employees of Pearl Harbor, Barber's Point and Schofield Barracks. And it does provide a very meaningful boundary." (R. 322)

Fifth senatorial district—"breakdown of the 5th and 6th Districts deviates from an existing political boundary. However, it is quite close to the boundaries used in census tract statistics by the United States Bureau of the Census. It also very neatly separates Kakaako from the central business district and it does seem to provide for a clear distinction between areas of different social and housing, economic characteristics." (R. 323)

Sixth and seventh senatorial districts — "division between the 6th and 7th Districts, with the exception of a small jog in the St. Louis Heights area, is identical to that between the 2nd and 3rd Taxation Zones. It corresponds to an old ahupua[a] line and has been used for statistical purposes. . . . [T]here is a considerable difference between the typical residences on the Koko head side [east] of Diamond Head as distinguished from the residences Ewa [west] of it. For example, the 6th District has most of the apartments, residential structures in Hawaii. The area on the Koko head side [east] of

the 7th District is primarily a single family housing district." (R. 323)

First senatorial district—The trend is a growing population for West Hawaii and a declining population for East Hawaii at such a rate that would tend to affect representation that would require more frequent districting than every ten years. Election at large as one district would effectively compensate population shifts within the county. (R. 324)

Mr. Schmitt also testified that the statistical "law of large numbers" might be a consideration in the use of multi-member districts rather than single-member districts. (R.318) He explained that a large number of small districts would be subject to considerable fluctuation in a short period of time in the number of registered voters whereas a small number of large districts would proportionately be subject to much less fluctuation in the number of registered voters so that areas of growth or declining population would tend to balance each other out over a period of a decade. (R. 318)

With respect to the character of the populace within the districts, Mr. Schmitt testified on cross-examination that the fifteenth representative district (portion of the sixth senatorial district) was heterogeneous from the standpoint of race, income and occupation. (R. 329) The fifth senatorial district was substantially composed of the twelfth, thirteenth and fourteenth representative districts. (R. 133) Mr. Schmitt described the upper part of Nuuanu in the fourteenth representative district as "a very distinct socio-economic area" with the highest proportion of wealthy widows. (R. 330) The people in the fourteenth were ethnically quite different with divergence in income and occupational status as well. (R. 330) The thirteenth had very little of the upper socio-economic status with a high percentage of persons of

Asiatic ancestry constituting more in the laboring class than those in the twelfth. (R. 330) The sixteenth and seventeenth representative districts which made up the seventh senatorial district contained heterogeneous classes of people with low-income Palolo Valley laborers and clerical workers to high income Waialae-Kahala professionals and managerial group. (R. 331)

2. Decision and Order on the Senate Plan

The court below, by its Decision and Order of April 28, 1965, held that the Senate plan failed to give each voter of the State of Hawaii the fundamental equality of representation to which each is entitled under the Fourteenth Amendment. (R. 162-63, 164; 240 F. Supp., at 731-32) The court below described the creation of boundaries of the third senatorial district which were identical to the boundaries of the eighth representative district and the creation of the boundaries of the sixth senatorial district which coincided to a great degree with those of the fifteenth representative district as "monolithic political units" or "monoliths". (R. 160; 240 F. Supp., at 730) A monolith, the court below stated, provides for the election of representatives and senators from one political and geographical unit all responsible to and representing exactly the same constituency (R. 160; 240 F. Supp., at 730) so as to "concentrate and intensify the voting power of a single senatorial-representative district to the point that voters therein have a built-in disproportionate representational advantage over any other voters of the State." (R. 159; 240 F. Supp., at 729) And the court emphasized that "[s]uch artificially concentrated political power negates any notion of equality of representation for the minorities entrapped therein, as well as for all other electors of the State outside such monolithic political unit."

(R. 160; 240 F. Supp., at 730) The court below concluded that "there should not be any monolithic political units of representation in that all inclusive system of apportionment" (R. 160; 240 F. Supp., at 729) lest the "demanded differing complexions and collective attitudes [in the house and senate] are lost." (R. 160; 240 F. Supp., at 729-30)

Additionally, the court below stated that "[t]here can be no truly representative government without a system of apportionment which provides potentially equal representation to the divergent factors incorporated within the body politic" (R. 158; 240 F. Supp., at 729) and that the Legislature failed or ignored to consider certain factors in setting up the senatorial districts. The court below stated: (R. 161; F. Supp., at 730)

> "While it is a fundamental factor under the decisions of The Court, population is not the sole definitive measure for setting up either representative or senatorial districts. Compactness and contiguity of the territory are admittedly also factors, but community of interests, community of problems, socio-economic status, political and racial factors—each and all must be considered, and not only must the electoral districts be laid out with the totality of those factors having been taken into consideration, but even more, the sum total of all of the districting must result in substantial equality of meaningful representation to each and all of the voters of the State. 'All who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income and whatever their home may be in that geographical unit. *Gray* v. *Sanders,* 372 U. S. 368, 378.'"

and further stated: (R. 156; F. Supp., at 728)

"Apparently, ethnic, political, industrial, economic, social, occupational factors, and community of interests and problems were given little if any consideration by the Legislature."

The court below did not dispute the fact that the Legislature used, at least, the bases of registered voters, geographical boundaries, historical representative district lines, compactness and contiguity. (R. 156; 240 F. Supp., at 727-28) It was never contended that there was not substantial equality of registered voter population among the eight senatorial districts under the Senate plan and the District Court agreed that the number of registered voters per senatorial district conformed to the standards required under the method of equal proportions prescribed by the Constitution of the State of Hawaii. (R. 155; 240 F. Supp., at 727)

Finally, the court below found "that the present multi-member district scheme of senatorial reapportionment resulted in a material part at least, from gerrymandering." (R. 163; 240 F. Supp., at 732) This finding was based on the "probability" that "[t]o have crosscut any of Honolulu's eighth, twelfth or fifteenth representative districts in order to mark out single-member senatorial districts would, with practical certainty, have left two or three present incumbents to compete head on for a single senatorial seat." (R. 163; 240 F. Supp., at 731) The court below also found that the "same factor of political self-preservation" motivated the districting of Hawaii county as an entirety. (R. 163; 240 F. Supp., at 731)

The court below also reviewed the testimony of Robert Schmitt but stated that "[h]e, however, had *not been consulted* on the problem of the multi-member districts vs. single-member, or the problem of district lines." (R. 156; 240 F. Supp., at 728)

The court below found that the Senate plan failed to meet the test of equality of representation set down by this Court and disapproved the plan. (R. 164; 240 F. Supp., at 732) Thereupon the lower court reinstated item 4 on pages 19-20, and item 6 on pages 20-21 of the Decision and Order of that court dated February 17, 1965, which enjoined the legislators from enacting any legislation until legislation for the calling of a constitutional convention shall have been enacted. (R. 164; 240 F. Supp., at 732) On application of May 13, 1965 by the Governor, Mr. Justice Douglas, on May 21, 1965, granted a stay of the District Court's injunction pending the issuance of the judgment of this Court.

SUMMARY OF ARGUMENT

I

In its proposed Senate plan, the Hawaii Legislature constructed multi-member senatorial districts with the apportionment of senate seats and the drawing of district lines based primarily on substantial equality of population,[5] boundaries of existing political subdivisions, compactness and contiguity, and historical and natural boundaries. The court below concluded as much. In passing upon the constitutionality of the Senate plan, however, the court below, noting that the Hawaii House of Representatives was composed of single-member and multi-member districts, imposed a rule of single-member districts, the deviation from which, the court insisted, must be justified with consideration of the totality of racial, socio-economic, occupational, political and community of interest factors in addition to the bases of population, compactness and contiguity, and historical

[5] The Hawaii Legislature utilized the registered voter population basis in the Senate plan pursuant to Final Order on Motion to Alter or Amend Judgment dated March 9, 1965. (R. 89)

and natural boundaries which were considered by the Hawaii Legislature. The court below also condemned the "monolithic political unit", where the boundaries of the district of one house are identical to or coincide to a great degree with the boundaries of a district of the other house, as giving the majorities within such districts a disproportional monolithic command over entrapped minorities and over voters in non-monolithic districts.

The court below did not apply the proper constitutional standard in (1) imposing a rule of single-member districts thereby requiring the Hawaii Legislature to justify the multi-member districts with racial, socio-economic, political, occupational and community of interest factors and (2) holding that the monolithic political unit is unconstitutional.

A. Single-member districts may be the rule in one State, while another State might desire to achieve some flexibility by creating multi-member or floterial districts. There is no rule of constitutional preference for single-member districts. The Hawaii Legislature desired and pursued the creation of multi-member districts. The Governor who opposed the Senate plan has the burden of demonstrating that the multi-member districting scheme operates to minimize or cancel out the voting strength of racial or political elements. The record is barren of any such demonstration that the Senate plan operates to minimize or cancel out anyone's voting strength in the overall representation accorded to the State's voters in both houses of the Hawaii Legislature.

The showing by the Hawaii Legislature that it utilized the basis of population as the controlling factor together with the usual and permissible bases of political subdivisions, compactness and contiguity, and natural and historical boundaries for the Senate plan was sufficient. In the absence of evidence showing that such bases were not em-

ployed, the Legislature was not obliged to further justify the multi-member districts with racial, socio-economic, political, occupational and community of interest factors. All principles and circumstances concerning such factors which reasonably may be conceived to justify and uphold the Senate plan are presumed to exist in favor of the validity of the legislative act. Moreover, the Hawaii Legislature was under no duty to consider race which is a constitutionally impermissible basis. The opponents of the Senate plan must demonstrate that the Senate plan operates to minimize or cancel out the voting strength of racial and political elements of the voting population.

B. The District Court's conclusion that the "monolithic political units" violate the Equal Protection Clause is entirely hypothetical. Where the geographical boundaries of certain districts of one house are identical to, or coincide to a great degree with, the geographical boundaries of certain districts of the other house, this situation results in the so-called monolithic political units. Every voter and every constituency in the State, not only the voters and constituencies in the monolithic districts, would elect senators and representatives, who represent them and who must be vigilant to serve their interests in both houses. And the record never showed the minimization of the voting strength of any racial, political, social or economic minorities within the monolithic districts.

C. The District Court's injunction against certain parties, including Elmer F. Cravalho, *et al.*, from enacting any legislation until certain reapportionment legislation satisfactory to the District Court has been passed should be vacated as unnecessary if this Court approves the existing House apportionment and the Senate plan as a whole. And if this Court finds that one or both houses are invalid, this Court should nevertheless vacate the injunction and remand to the Dis-

trict Court for reconsideration of the desirability and need for such a drastic remedy, in light of the decision and rulings of the Court in these consolidated appeals and the situation at the time of the issuance of such judgment.

II

A. Notwithstanding the invalidity of the provisions fixing the number of senators per senatorial district, the District Court has discretion to and did properly determine the validity of the apportionment of the Hawaii House of Representatives in the cause of affording necessary guidelines to the Hawaii Legislature. In *Fortson* v. *Dorsey*, 379 U.S. 433 (1965) this Court did not deem it unwise to answer substantial questions relating to Georgia's senatorial reapportionment at a time when the Georgia House of Representatives had been declared unconstitutional. *Fortson* v. *Toombs*, 379 U.S. 621, Appendix A at pp. 639-40 (1965).

Additionally, having found that there was no evidence to show that the Constitutional Convention would have apportioned the House in any other way than it did, the District Court held the provisions of the House apportionment severable from those of the Senate apportionment and properly determined the validity of the House apportionment.

B. The question of whether or not the District Court properly determined the validity of the House because of the alleged inseverability of the malapportioned Senate is now moot. This Court has before it the new Senate plan and the existing House apportionment which together constitute the bicameral system as a whole the validity of which is the subject of the several appeals at bar.

C. The District Court correctly held that the use of registered voters as a basis of apportionment did not, in Hawaii,

in fact designedly or otherwise operate to minimize or cancel out the voting strength of any elements of the voting population.

If total population were held to be the only basis for apportionment in Hawaii, the apportionment would result in gross inequity among citizens of the State eligible to vote particularly because of the large and fluctuating military population stationed and concentrated within a few legislative districts. The especially fluctuating circumstances of the military population in Hawaii render the total population figure an unstable, temporary and fleeting statistic. Moreover, those districts favored with the presence of the military provide breeding grounds for "rotten boroughs" where population is large and the number of voters is small. Additionally, the voter's vote in such districts would be weighted heavily and inequitably in his favor as against a vote of a voter living without such districts.

The registered voter basis provides a rational and suitable means of adjusting the apportionment base by excluding therefrom those of the military who are, by choice or circumstances, transients and will not or cannot register to vote in Hawaii. The military may register and vote if they qualify. The Constitution and laws of Hawaii do not *per se* exclude the military from establishing residence in Hawaii and thereafter becoming eligible to vote. The District Court found that the registration procedure does not discriminate against any class of persons. The use of the registered voter basis reflects population as envisioned by the Hawaii Constitutional Convention and comports with the equal population principle.

D. The District Court found that the multi-member districting of the House of Representatives was not invidious and followed along historical, political, geographic and

physical lines and that the apportionment was not the result of arbitrary and capricious action. Limitless possibilities exist in districting and apportionment that comport with the Equal Protection Clause, and the Governor's mere suggestion that other possibilities than the one adopted by the Constitutional Convention existed does not prove arbitrary and capricious action. Choice by the Constitutional Convention or Legislature as to one rational plan over another or more rational plans is not arbitrary action in the invidious sense.

Without a demonstration of invidious discrimination, the contention by the Governor that a person in a multi-member district has inordinate political advantage over a person in a single-member district because of the difference in numbers of legislators representing such persons is speculative. Conjecture based on political theory falls short of showing invidious discrimination.

As urged by the Governor, multi-member districts submerge minorities therein. There is no showing in the record to indicate who the minorities are and in what fashion they were invidiously discriminated against. Again the assertion of submergence is founded on speculation.

E. The District Court in its Order of April 28, 1965, disapproved the Senate plan declaring that the plan failed to meet federal constitutional requisites. The Governor contends that even if the Senate plan had not been violative of the Fourteenth Amendment, the District Court's refusal to approve should be sustained. While the District Court has a wide range of discretion in fashioning decrees to remedy malapportionment, judicial relief becomes appropriate only when a legislature has failed to reapportion according to federal constitutional requisites. *Reynolds* v. *Sims*, 377 U.S. 533, 586 (1964).

ARGUMENT

I. THE ERRORS OF THE DISTRICT COURT

In this Part I we brief the appeal of Elmer F. Cravalho, *et al.*, in No. 323. In Part II we will brief the issues on which Elmer F. Cravalho, *et al.*, stand as appellees.

A. The Equal Protection Clause Does Not Necessarily Require That the Hawaii Senate Be Apportioned In Accordance With a Rule of Single-Member Districts Notwithstanding That the Hawaii House of Representatives Is Composed of Single-Member and Multi-Member Districts. Absent Any Showing of Invidious Discrimination, Multi-Member Districts Are Valid In Both Houses.

The court below demanded that because Hawaii had a multi-member district House, the Senate should be redistricted into single-member districts, and any other than single-member senatorial districting would have to be justified by the Hawaii Legislature. (R. 154; 240 F. Supp., at 726)[6] The court below further ultimately indicated that the single-member rule was the "means by which the senate could be apportioned to give to every voter the equal protection and equal representation that he is entitled to without disturbing the makeup of the house." (R. 162; 240 F. Supp., at p. 731)

There is no such inflexible rule that requires one house of the legislature to be districted into single-member districts simply because the other house is composed of multi-member districts. Single-member districts may be the rule in one State, while another State might desire to achieve some flexibility by creating multi-member or floterial dis-

[6] See also Memorandum, Appendix B, pp. 21a-22a.

tricts. *Reynolds* v. *Sims*, 377 U.S. 533, 579 (1964). In *Lucas* v. *Colorado General Assembly*, 377 U.S. 713 (1964) this Court stated: "We do not intimate that apportionment schemes which provide for at-large election of a number of legislators from a county, or any political subdivision, are constitutionally defective. Rather, we merely point out that there are certain aspects of electing legislators at large from a county as a whole that might well make the adoption of such a scheme undesirable to many voters residing in multi-member counties." 377 U.S. 713, 731, n. 21.

Thus the issue with respect to multi-member districts is not constitutionality but desirability. The question of desirability is not for the courts but for the legislature or a constitutional convention authorized to reapportion and redistrict. The Hawaii Legislature in enacting the reapportionment plan constructed multi-member districts, the reasons for which were expressly set forth in the committee report (R. 130-39) and testified to by Senator Sakae Takahashi. (R. 296-99) The plan as submitted should not be disapproved as unconstitutional on its face simply because it did not adhere strictly to a rule of single-member districting.

In *Fortson* v. *Dorsey*, 379 U.S. 433 (1965), this Court reversed the judgment of the District Court which was based on the alleged infirmity that attached to the statute on its face. The Court reaffirmed the constitutionality of multi-member districts and expressly "rejected the notion that equal protection necessarily requires the formation of single-member districts," but emphasized: "It might well be that, designedly or otherwise, a multi-member constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population. When this is demonstrated it will be time enough

to consider whether the system passes constitutional muster." 379 U.S. 433, 439.

In the light of *Fortson* v. *Dorsey,* 379 U.S. 433 (1965), multi-member districts are valid, absent any showing of invidious discrimination. Similarly, the Senate plan composed of multi-member districts is valid, should not be subjected to any single-member district rule and should command constitutional validity, unless and until there is showing of invidious discrimination in and of itself or as a complement to the scheme of representation employed with respect to the House.

The court below places the burden of justifying multi-member districts on the Hawaii Legislature (R. 154; 240 F. Supp., at 726), and in condemning the Legislature in falling short of justifying the multi-member districts (R. 163; 240 F. Supp., at 731), cites *Butcher* v. *Bloom,* 415 Pa. 438, 203 A. 2d 556 (1964), which approaches the matter of apportionment "by setting up single-member districts unless valid and compelling reasons exist which require the creation of some multi-member districts." (R. 163; 240 F. Supp., at 731)

If the court below interprets *Butcher* v. *Bloom, supra* as authority that the Legislature has the burden of justifying multi-member districts, that case is not controlling in the light of *Fortson* v. *Dorsey,* 379 U.S. 433, 439, which holds that a reapportionment plan involving multi-member districts is not unconstitutional *per se* and places the burden of establishing that the multi-member districting scheme operates to minimize or cancel out the voting strength of racial or political elements of the voting population on the party challenging the plan. The record does not support the Governor as having fulfilled that burden.

The record is barren of any evidence indicating that the voting strength of any particular person or groups of persons was in any way minimized or cancelled out. There was evidence showing the heterogeneity of districts, and the court below made capital emphasis of the racial and socio-economic heterogeneity within certain senatorial districts, *e.g.* the sixth senatorial district (which included the fifteenth representative district) with a concentration of Japanese in the Moiliili area and Caucasians in Waikiki with the high level professonal, technical and managerial people tending to live in Waikiki or upper Manoa and the laborers, clerical workers, middle and lower-income people tending to concentrate in the central (Moiliili, etc.) area; the fifth senatorial district with its multitude of Caucasian widows in the upland area and an overabundance of Filipino males in the seaward portion of the district; and the seventh senatorial district (which included the sixteenth and seventeenth representative districts) with the high income professionals in Waialae-Kahala and the low income laborers and clerical workers in the Palolo area. (R. 157-58; 240 F. Supp., at 728-29) Nothing can be gleaned from the evidence to indicate which of the racial or socio-economic groups or the various blends of such groups is the minority in which of the districts or whose voting strength was cancelled out or diluted, if at all.[7] The Governor baldly asserts and argues on the presumption, and the court below agreed, that the wide divergence in the character and interests of the population from the standpoint of race, occupation, income grouping and interests necessarily results in the invidious "submer-

[7] Consider the possibility of a racial minority being among the wealthy majority, or part of a racial majority being among the lower income minority in a district. Quite obviously limitless possibilities exist in defining a "minority" group when one considers additional factors such as sex, occupation, political status, etc.

gence" of someone or some group. (R. 335) The clear inference is that the plan is defective because heterogeneous districts *could* submerge a particular racial or socio-economic group so as to nullify that group's choice and thrusting upon it a senator for whom no one in the group had voted resulting in a futile and illusory exercise of its valuable franchise.

In *Fortson* v. *Dorsey*, 379 U.S. 433 (1965) Georgia's Reapportionment Act of 1962 provided for 54 senatorial districts and apportioned the 54 seats of the senate among the State's 159 counties. All were single-member districts except that, where more than one senator was assigned to a single county, all senators were to be elected at large, thereby resulting in single-member and multi-member constituencies. The opponents of the Act asserted that the scheme was defective because county-wide voting in multi-member district counties could, as a matter of mathematics, result in the nullification of the unanimous choice of the voters of a district, thereby thrusting upon them a senator for whom no one in the district had voted. This Court rejected that argument as hypothetical which ignored the practical realities of representation in a multi-member constituency and stated: "It is not accurate to treat a senator from a multi-district county as the representative of only that district within the county wherein he resides. . . . [S]ince his tenure depends upon the county-wide electorate he must be vigilant to serve the interests of all the people in the county, and not merely those of the people in his home district; thus in fact he is the county's and not merely the district's senator." *Fortson* v. *Dorsey*, 377 U.S. 433, 438 (1965). Analogously a senator from a district with multi-racial and multi-socio-economic groups whose members live together in clearly defined areas, freely or fortuitously, in their respective groups, should not be treated as a representative of only such group or groups

to which he happens to belong. Since his tenure depends upon the district-wide electorate, he must serve the interests of all the people in his senatorial district, and the minority veto—the power of the stalemate—possessed by each of the diverse groups could well deter and prevent the political disaffection of diverse groups within the district.

This Court's decisions on reapportionment[8], requiring equal weight to be assigned to each man's vote, in a very important sense, improve the nature of representation within the democratic context. Equally weighted votes do not, in themselves, however, guarantee a perfect or even a good system of representation. Numerical parity is one, perhaps the most important, but only one of several interrelated factors which can be ordered in a variety of ways to obtain representative government.[9] Other factors include the matters here in issue being the type of districts—single-member or multi-member or a combination of them—and the nature of a district's population—homogeneous or heterogeneous.

The court below found it necessary to consider the ramifications of numerical parity upon the other factors in a representation system. (R. 161; 240 F. Supp., at 730) Within the democratic context, however, legislative reapportionment is recognized primarily as a matter for consideration and determination by the citizens of the community itself through its representatives to be effected within certain constitutional requisites. *Reynolds* v. *Sims*, 377 U.S. 533, 586 (1964).

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[8] *Reynolds* v. *Sims*, 377 U.S. 533 (1964); *WMCA, Inc.* v. *Lomenzo*, 377 U.S. 633 (1964); *Maryland Committee* v. *Tawes*, 377 U.S. 656 (1964); *Davis* v. *Mann*, 377 U.S. 678 (1964); *Roman* v. *Sincock*, 377 U.S. 695 (1964); *Lucas* v. *Colorado General Assembly*, 377 U.S. 713 (1964).

[9] See De Grazia, Essay on Apportionment and Representative Government, pp. 9-31.

Any community complying with the Court's decisions will be faced with having to make political decisions on other factors affecting its representation system. A community, having the inherent right to make such decisions, should be free to make decisions suited to the community. It should be axiomatic that the shaping and balancing of the major factors in such a way as to produce the most equitable and most effective democratic system is not the same for all political communities or for the same community at different stages during its development.

The theoretical best in state electoral systems for equal weighting of votes may well be proportional representation in state-wide elections. See Stewart, J. in *Lucas* v. *Colorado General Assembly*, 377 U.S. 713, 750, n. 12 (1964). And quite obviously there are limitless alternatives and possibilities for districting consistent with the equal population standard, but a community should have discretion in making political judgments to fulfill its desires and needs, provided that population is the controlling consideration in its legislative apportionment and provided that no one has demonstrated that its apportionment scheme operates to minimize or cancel out the voting strength of racial, political, social or economic elements of the voting population.

The Hawaii Legislature's decision against a rule of single-member districts for the Senate was based on its belief and determination that a representation system consisting solely of single-member districts for the Senate would tend to fragment representation and create representatives responsive only to the problems and needs of a very small part of Hawaii's total population. (R. 123) Fairly included under such a belief would be the related worry that a representation system of single-member districts may tend to encourage the building of personal, small community political machines and discourage representatives from coping with larger prob-

lems of general concern to the State or with large groups within the State. It may inhibit the building-up of coherent political party organizations in Hawaii which may demand some loyalty of individual representatives on major issues. It may also weaken the Hawaii Legislature itself for representatives loyal to different interests and with narrow perspectives may tend to abdicate their responsibility for determining matters of major interests.

The Hawaii Legislature in good faith has divested the less populated areas of their over-representation. It would seem that the Hawaii Legislature could reasonably find it desirable for Hawaii to foster development of legislators with more than provincial interests of a small single-member district at this crucial moment when the rural and agricultural counties of Hawaii, Maui and Kauai are to be divested of ten senate seats which would be allocated to the highly urban and industrial City and County of Honolulu (island of Oahu). (R. 113-14) Upon reapportionment on the basis of population (registered voters), the City and County of Honolulu increases in senate seats from nine to nineteen whereas the counties of Hawaii, Maui and Kauai decrease in such seats from sixteen to six. This drastic shift in senate seats would leave only six senators to represent constituencies of the seven islands of Hawaii, Maui, Molokai, Lanai, Kahoolawe, Kauai and Niihau and nineteen senators to represent the interests of one island of Oahu. It would indeed be a propitious moment to inject that policy which encourages Oahu senators away from provincial interests of small single-member districts toward a sense of state-wide concern.

In addition to its concern against the creation of legislators responsive only to special-interest constituencies in single-member districts, the Hawaii Legislature may well have been prompted to favor heterogeneous districts over homogeneous enclaves as a desired policy to achieve certain

results which heterogeneous districts would accomplish and which the Legislature believed desirable for Hawaii at this particular period of its political development. Legislative districts which encompass diverse racial, social and economic elements are consistent with the democratic ideal and would encourage the various groups to participate in political activities with each other and work together in the political process. *Cf.* Douglas, J. in *Wright* v. *Rockefeller,* 376 U.S. 52, 63-67 (1964). At this stage in Hawaii's political development when the diverse elements are working well together the legislative districts in the Senate plan would further this development.

Heterogeneous districts tend to foster candidates who must be responsible to several group interests diverse on political issues, and the political compromises are effected during the election process. Homogeneous districts tend to foster candidates who are inclined to assume more singular stands on issues concerning a constituency with a provincial outlook. The political compromise process then tends to occur in the legislature rather than during the electoral process. Either system might be desirable at a particular period of a political community's development. The choice as to the desired district is, in large measure, a judgmental decision premised on the criterion of how best to achieve effective representation in a particular state at a particular time. In Hawaii, for example, a candidate running from the Kahala-Aina Haina area would tend to reflect the views of a relatively upper middle-class population. (R. 331) If, however, his district included both higher-income Kahala and lower-income Palolo he would tend to take broader stands to represent both population groups. (R. 331)

It would seem that the Hawaii Legislature could also reasonably find it desirable for Hawaii at this particular period of its political development to continue the traditional expe-

rience of heterogeneous districts, to have political issues determined by political compromises effected during the election process and to have the responsiveness of the legislators to diverse groups checked by the minority veto in a heterogeneous setting. The Legislature may have further reasonably found that the better legislators are bound to emerge from districts that are diverse in their socio-economic characteristics which would demand a legislator who must be conversant with more than a single electoral group and possessed of those skills to persuade and serve the interests of diverse groups. The Hawaii Legislature is presumed to have acted within its constitutional power. If any state of facts reasonably may be conceived to justify the use of multi-member districts which are heterogeneous in characteristics, then the Senate plan should be upheld. *McGowan* v. *Maryland*, 366 U.S. 420, 425-26 (1961). The traditional application of this presumption in the instant case is especially compelling in that nowhere in the record does it expressly appear by testimony or exhibit that the Legislature *did not* consider socio-economic, industrial, occupational, or community of interest factors. While the committee report and Senator Sakae Takahashi's testimony were sparing with respect to a discussion of such factors, the committee report did state that the conference committee sought to preserve the Kalihi community against an alternative of cutting it up. (R. 137) And in his explanation of why the first and eighth precincts of the eleventh representative district were combined with the tenth representative district as part of the proposed fourth senatorial district, Senator Takahashi testified that they "found it to be logical to transfer these two precincts to the 4th Senatorial District because the areas involved are characteristic of the entire 10th District, 10th Representative District. It is not in a solidly urban area." (R. 300-01) In the Senate plan the Legislature chose to

construct districts which encompass heterogeneous constituencies. The Legislature, however, has drawn the encompassing district lines along meaningful natural, political, socio-economic and community boundaries. The fact that Robert Schmitt, who testified to the various demographic characteristics of the proposed senatorial districts (which characteristics had not been covered in the committee report or Senator Takahashi's testimony), had not been consulted (R. 326) should in no way rebut the presumption that such relevant facts were before the Legislature when it enacted the plan. The court below implies the presumption to have been effectively rebutted simply because Robert Schmitt had *not been consulted* (R. 156; 240 F. Supp., at 728), a conclusion bottomed on a hypothetical as it assumes Robert Schmitt to be the sole source of the matters he testified to and foreclosing any possibility that the legislators were independently knowledgeable of such matters.

To present a prima facie case, the opponents of the plan must show that the apportionment is inconsistent with any of the obvious and permissible bases of representation. Frankfurter, J., in *McGowan* v. *Maryland*, 366 U.S. 420, 468, 535 (1961); *Wright* v. *Rockefeller*, 376 U.S. 52, 57 (1964); 72 Yale LJ 968, 996. Without the benefit of the lower court's imposition of the rule of single-member districts, the deviation from which had to be justified with racial, socio-economic and other factors, the record does not support the Governor to have accomplished his prima facie case.

As earlier noted, the Legislature had reapportioned and redistricted the senatorial districts on the basis of population (registered voters), with consideration of existing political subdivisions, natural and historical boundaries, compactness and contiguity. (R. 136) The court below readily acknowledged the use of these bases by the Legislature, (R. 156; 240 F. Supp., 727-28) and approved of them as

proper and permissible bases in districting (R. 161; 240 F. Supp., at 730) except that multi-member districts had to be justified with racial, socio-economic, political and other such factors. No one contended that there was not substantial equality of population, and the court below found and agreed that the Legislature had met that test of substantial equality of population. (R. 155; 240 F. Supp., at 727) Senator Sakae Takahashi testified as to the reasons of the Legislature's choice in selecting multi-member districts over single-member districts (R. 296-97) which reasons had been explicitly set forth in the committee report. (R. 135) He further stated the position taken by the committee that there was "nothing wrong with having multi-member districts in the Senate and multi-member districts in the House." (R. 298) Mr. Robert Schmitt, a statistician, substantiated the rationality of the Senate plan and testified that the district lines followed natural, historical, geographic, census and community lines in logical pattern (R. 320-25) summarizing with the statement: "I would say this senatorial district [plan], as proposed, shows a good deal more logic and meaningfulness than the existing representative district [plan]." (R. 325)

Against all this evidence buttressed by the presumption that the Legislature acted in accord with federal constitutional requisites, the Governor could only present evidence showing certain districts to contain heterogeneous groups divergent in race, wealth, occupation, and interest (R. 329-32), and allude to an inconsistency that the Legislature ignored mountain and lava flows which separated East Hawaii from West Hawaii in combining them into one district (R. 308) and suggest that in the cause of homogeneity other possible alternatives in senatorial districting existed involving the 12th, 13th and 14th representative districts. (R. 309-10) The Governor also showed that certain senators

maintained residences in close proximity (R. 308) suggesting, and the court below found, that political self-preservation of the senators prompted the avoidance of single-member districts which would have left certain incumbent senators to compete head on for a single senatorial seat. (R. 163; 240 F. Supp., at 731) It was also brought out that the Legislature did not consider reapportioning the House when it adopted the Senate plan. (R. 297)

But wherein lies the demonstration of *invidious* discrimination? The burden of showing the Senate plan to be invidiously discriminatory must be sustained by the one who claims such injustice and seeks to have it set aside, and it must be sustained not as a matter of speculation but as a demonstrable reality. *Fortson* v. *Dorsey,* 379 U.S. 433, 437 (1965); *Beck* v. *Washington,* 369 U.S. 541, 558 (1962). It is abundantly clear that a demonstration of invidious discrimination to the satisfaction of the court below in rejecting the plan was based on its own conclusions of law that where the House is based on multi-member districts and found to be valid, invidious discrimination is presumed in a districting plan for the Senate which is composed of multi-member districts (R. 154; 240 F. Supp., at 726), and that "monolithic political units" give majorities within such districts a disproportional monolithic command over entrapped minorities and over other voters in non-monolithic districts (R. 160; 240 F. Supp., at 729-30), the Hawaii Legislature thereby failing to positively complement the Senate plan to the makeup of the House. No conclusion or finding by the court below of invidious discrimination is founded on a clear and persuasive showing that the Senate plan operated to minimize or cancel out the voting strength of identifiable racial or political elements. It is submitted that the evidence adduced against the Senate plan merely suggest the *possibility* of submergence of a minority in a heterogeneous district, and the

possibility of political gerrymander because of the proximity of the residence of certain senators.[10] Such speculation coupled with erroneous conclusions of law fall far short of achieving that difficult burden of demonstrating that quantum of proof required to void a legislative act as repugnant to the Equal Protection Clause.

Further, race is a constitutionally impermissible basis for districting regardless of benefits, harms or motives, and the Legislature was under no duty to consider or justify the plan with racial factors.

Admittedly, some of the senatorial districts contained diverse racial groups with persons of the same or similar ethnic background "ghettoized", by choice or chance, in definitely identifiable areas. (R. 329-30) In addition to population, compactness and contiguity, which bases the court below agreed that the Legislature used in districting the Senate, (R. 156; 240 F. Supp., at 727-28) the court below emphatically stated that "community of interests, community of problems, socio-economic status, political and *racial* factors —each and all must be considered, and . . . the electoral districts be laid out with the totality of those factors having been taken into consideration." (emphasis added) (R. 161; 240 F. Supp., at 730) The court below found that the Legislature failed to adequately consider race and to justify the Senate plan with such factor. (R. 161; 240 F. Supp., at 730) However well meaning the court below may have been in its zeal to accomplish effective representation by requiring the Legislature to show that the plan was subjected to a full exposure of the group dynamics of American politics and

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[10] Even if political self-preservation of the senators prompted the avoidance of single-member districts, political gerrymander is not subject to federal constitutional attack under the Fourteenth Amendment. *Cf. WMCA, Inc.* v. *Lomenzo*, 238 F. Supp. 916 (S.D.N.Y. 1965) *aff'd* No. 85, O.T. 1965, October 11, 1965.

justified by such factors to test the responsiveness of the plan. racial classifications are impermissible. *Brown* v. *Board of Education,* 347 U.S. 483 (1954), *Johnson* v. *Virginia,* 373 U.S. 61 (1963).

This Court has consistently declared racially segregated parks[11], beaches[12] and golf courses[13] unconstitutional. While the issue of impermissible classification by race in the *Brown* and post *Brown* cases arose in the context of obvious racial discrimination, the court below in the instant case presumably would have the Legislature consider the racial factor and would acquiesce to state sponsored racial segregation in districting to promote or preserve political advantage, as opposed to racial discrimination, with a view toward "substantial equality of meaningful representation to each and all of the voters of the State." (R. 161; 240 F. Supp., at 730) Although the racial factor is here obviously intended by the court below to be used as a basis in districting to accomplish a benevolent or positive discrimination to avoid foreclosure or "submergence" of the minorities, the principle enunciated in the *Brown* case is that the Constitution finds no room for racially drawn districts regardless of its motive, benevolent effects or discriminatory harm. 72 Yale LJ 1041, 1051; Douglas, J. in *Wright* v. *Rockefeller,* 376 U.S. 52, 59 (1964).

Arguably, the insistence of the court below that the Legislature "must" consider racial factors may be construed, not as a sponsorship of benign racial segregation, but as a duty on the part of the Legislature to use the racial criterion

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[11] *New Orleans City Park Improvement Ass'n* v. *Detrige,* 252 F.2d 122 (C.A. 5th Cir.) *aff'd* 358 U.S. 54 (1958).

[12] *Dawson* v. *Mayor of Baltimore,* 200 F.2d 386 (C.A. 4th Cir.) *aff'd* 350 U.S. 877 (1955).

[13] *Muir* v. *Louisville Park Theatrical Ass'n,* 202 F.2d 275 (C.A. 6th Cir.) *vacated and remanded,* 347 U.S. 971 (1954).

to affirmatively avoid the constitutional evil of intended racially homogeneous districts. This, however, is not borne out in the light of the lower court's finding, in its order of February 17, 1965, that Keaukaha with its smaller population composed of almost entirely Hawaiian[14] extraction was properly excluded from the Puna district whose larger population was very predominantly of Japanese extraction. (R. 76-77; 238 F. Supp., at 476-77) To do otherwise, the court below stated, would have left Keaukaha with *no* real representation. (R. 77; 238 F. Supp., at 477) Clearly and inescapably, the manner in which the racial factor was considered by the court below leaves no doubt that it regards racial classification as a probative, permissible and necessary basis for districting. The Puna-Keaukaha districting, however, was supported by compelling factors other than race such as contiguity, separate neighborhood and other geographic factors to warrant the separation of Keaukaha from Puna. (R. 76; 238 F. Supp., at 477)

Race is and traditionally has been of constitutional irrelevance. *Edwards* v. *California,* 314 U.S. 160, 185 (1941). Statutory classification by race is by its very nature "odious to a free people whose instructions are founded upon the doctrine of equality." *Hirabayashi* v. *United States,* 320 U.S. 81, 100 (1943). The motives or purposes of the Legislature are entirely irrelevant. *Eubanks* v. *Louisiana,* 356 U.S. 584, 588 (1958).

Hawaii is composed of a multi-racial populace compacted within eight small islands. Races or ethnic groups of Caucasians (R. 329), Japanese (R. 329), Chinese (R. 271), Hawaiians (R. 76) and Filipinos (R. 330) are mentioned in the record as constituting part of Hawaii's population.

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[14] An ethnic group as distinguished from residents or citizens of Hawaii.

The names of the members of the conference committee (R. 111-12) indeed suggest the Senate plan as resulting from the joint effort of legislators with various ethnic backgrounds. While not judicially established, Hawaii has earned a reputation of racial harmony. Statehood for Hawaii in 1959 with its diverse racial peoples was a testament to that tradition and principle of our democratic society that the individual is important, not his race, color or creed. Racial consideration in districting would serve as a divisive force artificially creating and magnifying differences between candidates and voters that are irrelevant in the constitutional sense, See Douglas, J. in *Wright* v. *Rockefeller,* 376 U.S. 52, 66 (1964), a result particularly tragic to the Hawaiian community with its heritage of racial harmony. And given the settled principle that a State may not encourage its citizens "to vote for a candidate solely on account of race," *Anderson* v. *Martin,* 375 U.S. 399, 404 (1964), racial districting should be equally condemned as the state creates that setting, in however a subtle or indirect manner, which tends to limit a voter to vote for his racial kind.

Nor should expedience justify racial classification. To allow for impermissible race classification in districting as an expedient in the light of the possible advantages is to ignore the many subtle consequences attendant in racial districting. The resulting state sponsored political ghetto would foreclose opportunity for one to participate in various political activities with members of another race. The inherent detriment appears no less discriminatory than that injury presumed to result in segregation of schools and parks.[15] Moreover, it is popularly presumed that effective representation would be enhanced in having racial districts

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[15] See Comment, *Wright* v. *Rockefeller* and Legislative Gerrymanders—The Desegregation Decisions Plus a Problem of Proof, 72 Yale LJ 1041, 1052.

where voters can be represented by someone of their own ethnic background who understands their interests, problems and needs.[16] While there may be something to be gained in psychic advantage and satisfaction in allowing a voter to elect one of his racial kind, too often the identity of interest is mistakenly assumed by the color of one's skin. With these uncertain effects of racially segregated voting districts, it appears extremely unwise to even begin to approach consideration of so important a principle as the presumptive or *per se* invalidity of statutes based on race as yielding to situations involving racially segregated voting districts, and particularly in the case at bar, the record of which is wanting in the factual demonstration of any need for and benefit from racially reflective constituencies in the Hawaiian community.

B. The Fact That the Geographical Boundaries of Certain Districts of One House of a Bicameral Legislature Are Identical To, Or Coincide To a Great Degree With, the Geographical Boundaries of Certain Districts of the Other House Does Not Violate the Equal Protection Clause.

According to the District Court, "monolithic" political units violate the Fourteenth Amendment. Where the geographical boundaries of certain districts of one house are identical to, or coincide to a great degree with, the geographical boundaries of certain districts of the other house, this situation results in the so-called monolithic political units. (R. 160; 240 F. Supp., at 729-30)

The District Court held that in order to achieve equality of representation, there should not be any such monoliths in

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[16] As intimated by the court below in its analysis of the Puna-Keaukaha districting. (R. 76-77; 238 F. Supp., at 477)

the reapportionment plan. (R. 160; 240 F. Supp., at 729) The District Court pointed out the monoliths in the Senate plan. (R. 160-61; 240 F. Supp., at 730) The 3rd senatorial district and the 8th representative district are the same. Also, the 6th senatorial district is to a certain extent identical to the 15th representative district.

The District Court condemned monolithic political units for two theoretical defects. (R. 160; 240 F. Supp., at 729-30) First, the monolithic political units would elect senators and representatives responsible to and representing the same constituencies. Second, the majorities in such districts would have a disproportional monolithic command over the entrapped minorities therein. The District Court felt that the monoliths do not provide the necessary cross checking and balancing of the two houses to correct the alleged defects above. We contend that monoliths do not result in the alleged defects nor does the record substantiate such defects.

In the District Court's explanation of the first of the alleged defects, it stated with reference to the 3rd senatorial district and 8th representative district: "Thus from *one* political and geographical unit would be elected four representatives and three senators—seven members of the legislature all responsible to and representing exactly the same constituency!" (R. 160; 240 F. Supp., at 730) First, there is no mathematical disparity in the fact that the voters of the 3rd senatorial district and the 8th representative disrict would elect seven members of the Legislature. Secondly, every voter and every constituency in the State, not only the voters and constituencies in the monolithic districts, would elect senators and representatives, who represent them and who must be vigilant to serve their interests in both houses. *Cf. Fortson* v. *Dorsey*, 379 U.S. 433, 438 (1965).

With reference to the 6th senatorial district and 15th rep-

resentative district, the District Court stated: "Similarly, the sixth senatorial district was fashioned almost entirely from the fifteenth representative district, with the result that from the fifteenth representative unit, *i.e.*, from the dominant three-fourths of the voting population of that senatorial district, would come six representatives and four senators. (31,302 of the senatorial district's total of 40,629 voters reside in the fifteenth representative district)". (R. 160-61; 240 F. Supp., at 730) Here, the District Court indulged in the assumption that the three-fourths of the voting population which reside in the 15th representative district would vote as a monolith to dominate the election of the six representatives and four senators. The assumption is certainly hypothetical in view of the diverse "sub-districts" within that three-fourths of the voting population. (R. 269-72) The District Court also ignored the effect of the additional one-fourth of the voting population on voting alignments within the 6th senatorial district.

With respect to the second of the alleged defects, the District Court does not find and the record does not disclose which are the dominant majorities and which are the entrapped minorities within the monolithic districts. The District Court never specified any dominant majority or entrapped minority in the 3rd senatorial district and 8th representative district. The District Court does make reference to the various groups in the 6th senatorial district and 15th representative district. However, it cannot specify which is the dominant majority and which are the entrapped minorities, if any. The record shows that the 6th senatorial district and 15th representative district encompass diverse "sub-districts." (R. 269-72) Waikiki, the center of tourism in Hawaii is within this area. The people here are short-term residents. They are middle and upper middle class. There is a high percentage of Caucasians. (R. 270-71) This so-

called monolithic unit also includes the McCully and Moiliili sub-district. The people here are largely middle and lower middle class. Occupationally, they are skilled, semi-skilled and clerical workers. There is a high percentage of Japanese residents. (R. 271) Then there is the Kapahulu sub-district, which is comparable to McCully and Moiliili. Racially, however, there are more Hawaiians and fewer orientals. (R. 271) These two districts also encompass the upper Manoa area. The people in this sub-district are professional, technical and managerial. (R. 329) Then there is the Bingham Tract, lower Manoa, St. Louis Heights sub-district, in which there is a large percentage of Chinese, a fair number of Japanese, some Hawaiians and some Caucasians. They are predominantly middle class. There are professionals, semi-professionals and managerial people here. (R. 271-72) The "University Community", around central Manoa, is another sub-district, and, of course, has a high proportion of University faculty and employees, and some students. (R. 272) Another sub-district is Makiki Heights and Tantalus. This area has many of the same characteristics as upper and central Manoa, except that the population density is lower. (R. 272) Manoa, generally, is largely Caucasian with a growing admixture of Chinese and some Japanese. (R. 271)

Even the sub-districts do not enclose strictly monolithic groups. The testimony of Robert Schmitt refers to percentages and proportions of racial, social and economic elements within the sub-districts. (R. 271-72) And the various racial, social and economic classifications overlap, *e.g.*, a person may belong to a racial minority but a social or economic majority. The District Court's assertion that monolithic majorities command entrapped minorities has no foundation in the record.

The Hawaii Legislature constructed the district lines for

these two so-called monolithic districts based on natural and historical boundaries. The key terrain feature which demarcated the 3rd senatorial district and 8th representative district is the Koolau Mountain Range, which sets off the entire "windward" side of the island of Oahu. (R. 136-37) This district has formed a unit since early Hawaiian history. (R. 321) The Hawaii Legislature added a part of the 14th representative district to the 15th representative district to form the 6th senatorial district to increase the number of registered voters for a four-member senatorial district in consistence with the equal population principle. (R. 300) The resulting division between the 6th and 5th senatorial district rationally separates the Kakaako area from the central business district.[17] (R. 323)

The so-called monoliths fail to show that the two houses do not complement each other. If the opponents of the total scheme of legislative apportionment prove an inequity in one house, then such inequity should be balanced in the other house. But if the record does not substantiate any real inequities, cross-checking and balancing are not demanded willy nilly.

C. This Court Should Vacate the District Court's Injunction Against the Legislators From Enacting Any Legislation Until Certain Reapportionment Legislation Satisfactory to the District Court Has Been Passed.

On April 28, 1965, the District Court rejected the Senate plan submitted by the Hawaii Legislature and thereby reinstated its permanent injunction against the parties, including Elmer F. Cravalho, *et al.*, from enacting any legislation until legislation looking toward the convening of a constitu-

[17] Further, the District Court in its February order found that districting for the House of Representatives was not invidious. (R. 75; 238 F. Supp., at 476)

tional convention to propose amendments to the Hawaii Constitution (to be then submitted to the electorate) effecting reapportionment of the Senate, has been passed. (R. 80, 164; 238 F. Supp., at 479; 240 F. Supp., at 732) This injunction is directed against certain parties which include the majorities of both houses of the Hawaii Legislature. At that time the injunction prohibited the legislators from enacting legislation essential for the health and welfare of the people of Hawaii and appropriations legislation for the orderly functioning of State and county governments in the fiscal year beginning July 1, 1965. In view of such emergency, on May 13, 1965, an Application for Stay of this severe remedy was presented to Mr. Justice William O. Douglas. On May 21, 1965, Mr. Justice Douglas granted the stay. The Hawaii Legislature then was able to pass the essential legislation for the fiscal year 1965-66. The stay is to remain in effect pending the issuance of the judgment of this Court.

If the judgment of this Court is that the total scheme of Hawaii legislative apportionment, composed of the present House apportionment and the Senate plan comports with federal constitutional requisites, then the injunction should be vacated as unnecessary. And if the judgment of this Court is that one or both houses are invalid, then the Court should nevertheless vacate the injunction and remand to the District Court for reconsideration of the desirability and need for such a drastic remedy,[18] in light of the decision and rulings of the Court in these consolidated appeals and the situation at the time of the issuance of such judgment. *Cf. Fortson* v. *Toombs*, 379 U.S. 621 (1965). We also respectfully

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[18] According to the Hawaii Constitution the Legislature shall convene in budget session on February 16, 1966. The Legislature must provide appropriations legislation for the fiscal year 1966-67 and any urgency measures necessary in the public interest. Article III, Section 11, Constitution of the State of Hawaii (Appendix A, p. 4a-5a)

suggest to the Court that it might be appropriate that its opinion disapprove any reimposition of such an injunction at a time when it would threaten the severe interference with the machinery of State and county governments which it did at the 1965 session.

II. THE CORRECT DETERMINATIONS OF THE DISTRICT COURT.

A. The District Court Properly Determined the Validity of Certain Provisions of the Hawaii Constitution Relating to Apportionment, Notwithstanding the Invalidity of the Provisions Fixing the Number of Senators Per District.

In its order of February 17, 1965, the District Court declared invalid the provisions of the Hawaii Constitution fixing the number of senators per senatorial district. (R. 79; 238 F. Supp., at 478) The District Court found nothing invidious in the total number of senators, *i.e.*, 25 (R. 66-67, n. 4; 238 F. Supp., at 472, n. 4), nor in the districting of the Senate. (R. 75; 238 F. Supp., at 476) The apportionment of the Hawaii House of Representatives was declared valid. (R. 79-80; 238 F. Supp., at 478-80)

The proper judicial focus, of course, is the total scheme of State legislative apportionment. A District Court, however, acts properly when it states its views to provide guidelines for legislative action. *Reynolds* v. *Sims*, 377 U.S. 533, 586 (1964). It should be left to the District Court's discretion to decide whether it should determine the validity of certain provisions of legislative apportionment, notwithstanding the invalidity of the provisions fixing the number of senators per district. In this case, the legislators of both houses had intervened to make known their views and seek guidelines for the purpose of reapportionment. Under such

circumstances the District Court appropriately determined the validity of the House apportionment and certain other provisions of the Hawaii Constitution relating to apportionment.

Indeed, in *Fortson* v. *Dorsey*, 379 U.S. 433 (1965) this Court has deemed it wise to answer substantial questions relating to Georgia's senatorial reapportionment alone. At that time the apportionment of the Georgia House of Representatives had been declared unconstitutional. *Fortson* v. *Toombs*, 379 U.S. 621, Appendix A at pp. 639-40 (1965).

Thus the three-judge court acted within its discretion in determining the validity of the House apportionment. It was also appropriate for the District Court to declare as a guideline for legislative action that the districting for both houses under the Hawaii Constitution was not invidious. The total number of senators, *i.e.*, 25, of course was not invidious. *Cf. Reynolds* v. *Sims*, 377 U.S. 533, 581, n. 63 (1964).

Further, the District Court properly determined the validity of the House apportionment, because it found that the apportionment of the House of Representatives was severable from the apportionment of the Hawaii Senate. The District Court found that there was no evidence to show that the Constitutional Convention would have apportioned the House in any other way than it did. (R. 66; 238 F. Supp., at 472) The Constiutional Convention thoroughly explored the matter of the size of the two bodies. (R. 66-67, n. 4; 238 F. Supp., at 472, n. 4) The Convention also thoroughly discussed the registered voter basis of apportionment. (R. 68-69; 238 F. Supp., at 473) And as the records of the Constitutional Convention show, the districting, both for the Senate and House of Representatives, followed along historical, political, geographic and physical lines. (R. 75; 238 F. Supp., at 476)

B. The Question Whether the District Court Properly Determined the Validity of Certain Provisions of the Hawaii Constitution Relating to Apportionment, Notwithstanding the Invalidity of the Provisions Fixing the Number of Senators Per District, Is Now Moot.

The Hawaii Legislature has now presented a new total scheme of legislative apportionment. The legislators have enacted the Senate plan to replace the concededly malapportioned Senate under the Hawaii Constitution, and the legislators have always supported the apportionment of the House of Representatives under the Hawaii Constitution, since their intervention in this case. (R. 45-53)

Thus the new Senate plan and the existing House apportionment is now the complete legislative apportionment package for the State of Hawaii. The Governor contends that the District Court's determination of the validity of certain provisions of the Hawaii Constitution relating to apportionment has grossly embarrassed orderly reapportionment in Hawaii. This contention is based on the premise that the complete legislative apportionment package provided by the Senate plan and the existing House of Representatives violates the Fourteenth Amendment. We contend that this complete legislative apportionment is in accord with federal constitutional requisites.

Since the legislators have now presented this complete legislative apportionment for review by this Court, the question whether the District Court properly determined the validity of certain provisions of the Hawaii Constitution relating to apportionment is now moot.[19]

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[19] The District Court's determinations may also be regarded as precatory and advisory. *Cf. Reynolds* v. *Sims*, 377 U.S. 533, 586, n. 68 (1964).

C. The District Court Properly Determined the Validity of the "Registered Voter" Basis For Legislative Apportionment For Hawaii.

The court below held in its February decision that the "use of registered voters as a basis of apportionment did not, in Hawaii, in fact 'designedly or otherwise . . . operate to minimize or cancel out the voting strength of [any] . . . elements of the voting population.'" (R. 75; 238 F. Supp., at 476) It further found that that basis of apportionment when adopted in 1950 and when used for reapportionment in 1959, did in fact at those times result in apportionment substantially on a population basis. (R. 68; 238 F. Supp., at 473)

In asserting that the registered voter basis for legislative reapportionment in Hawaii is an impermissible measure of representation, the Governor reasons that "those who may not vote are still entitled to representation." (Gov. 48) On this we understand the Governor to mean more specifically, and we agree, that those who may not vote may still be counted in the apportionment base. A State may, however, justifiably classify and exclude certain persons from the apportionment base.[20]

The exclusion from the apportionment base is admittedly discriminatory, but the prohibition of the Equal Protection Clause goes no further than the *invidious* discrimination. *Williamson* v. *Lee Optical of Oklahoma, Inc.* 348 U.S. 483, 489 (1955). It is submitted that that point has not been reached here. To be sure, the Governor concedes that discriminatory governmental limitations may be placed on the right to vote to guarantee mature and informed judgment

[20] In *Davis* v. *Mann*, 377 U.S. 678, 691 (1964), the Court held that discrimination against military personnel by excluding them from the apportionment base merely because of the nature of their employment, *without more being shown*, is constitutionally impermissible. Presumably certain exclusions may be permissible if "more" be shown.

by the electorate. (Gov. 48) And a statutory discrimination will not be set aside if any state of facts may be reasonably conceived to justify it. *McGowan* v. *Maryland*, 366 U.S. 420, 425-26 (1961).

The question involved here is to what degree, if at all, the Equal Protection Clause limits Hawaii's freedom to establish appropriate legislative apportionment on a population basis excluding certain classes of people. The apportionment of the Hawaii House of Representatives based on registered voters is substantially based on population.

In *Reynolds* v. *Sims*, 377 U.S. 533 (1964), this Court was not concerned with the problem of defining what it meant by population. That issue was not before this Court. It was merely fortuitous that the apportionment plan for the Alabama House of Representatives provided by the Alabama Constitution required decenniel reapportionment based on inhabitants as ascertained in the decenniel census of the United States. Enroute to its decision and in enunciating the equal population principle, however, the Court referred to the practical impossibility to arrange legislative districts so that each one has an identical number of *residents*, or *citizens*, or *voters*. *Reynolds* v. *Sims*, 377 U.S. 533, 577 (1964). Even if total population is of necessity the starting point for legislative apportionment, the Court suggests tacit acquiescence of a resident, citizen or voter population basis for state apportionment as embraced within the meaning of "population basis" by the Court's use of the terms residents, citizens and voters interchangeably. Accordingly, the Court acknowledged the use of a "citizen population instead of total population, excluding aliens from consideration, for purposes of legislative apportionment." *WMCA, Inc.* v. *Lomenzo*, 377 U.S. 633, 641 (1964).

The Governor further contends that the registered voter basis may be upheld "only if it happens to be an adequate re-

flection of total population—and only as long as it is." (Gov. 43) In the same vein, the District Court in *Ellis* v. *Mayor of Baltimore*, 234 F. Supp. 945 (D. Md. 1964), *aff'd* 4th Cir., October 11, 1965, 34 U.S.L. Wk. 2215, suggests a requirement that the ratio of the number of registered voters to the number of total population be substantially equal among the districts. *Id.*, at 958. But such an inflexible standard of mathematical correlation forecloses a State from rationally ever classifying and excluding certain persons from total population in determining the apportionment base. We do not believe that such a harsh and restrictive standard was intended under the equal population principle. And we contend that the registered voter basis for apportionment in Hawaii substantially and adequately reflects total population not by mathematical correlation between total population and registered voters but by rational and constitutionally permissible exclusions of certain classes of persons from total population. The *Ellis* case, *supra*, was decided on the premise that the population statistic (to which the registered voter statistic was compared) was a fair estimate of total population without issue as to the fairness of the population statistic. In the case at bar, however, one of our contentions is that the federal census population is not a fair estimate of total population in Hawaii because of the significant transient military population which severely distorts the total population statistic.

Not only did this Court note in *WMCA, Inc.* v. *Lomenzo*, 377 U.S. 633 (1964), that New York used citizen population instead of total population, excluding aliens from consideration, for purposes of legislative apportionment, but also demonstrated the arithmetical inequities of the State's apportionment scheme by basing its calculations on citizen population. *Id.*, at 647-51. There was nothing in that opinion intimating that the citizen population base contributed in

any way to the unconstitutionality of the State's scheme, nor was there hint of any concern by this Court that the ratio of citizen population to total population must be substantially equal among the districts before demonstration of arithmetical inequities by calculations based on citizen population could be relevant. *Cf. Buckley* v. *Hoff*, 243 F. Supp. 873 (D. Vt. 1965). Although the question was not before the Court, it is obvious that the Court assumed that New York could classify and exclude aliens from the apportionment base and that such classificatory basis was a rational one and constitutionally permissible. The scrutiny in the instant case should focus, therefore, not on the mathematical quantum or degree of deviations between total population and registered voter population among the districts in Hawaii but on whether or not the classification and exclusion of those who cannot or did not register to vote from the apportionment base are rational and constitutionally permissible in Hawaii's attempt to order an over-all representation system to comport with the equal population principle.

The use of a total population basis in an apportionment plan for Hawaii would unduly weight a voter's vote in his favor simply because he happens to live in an area more populous by virtue of a non-voting and transient population, thereby submerging that assurance to each citizen of an equally effective voice in the election of members of the Hawaii Legislature.

The 1960 federal census definition of population was based on all persons whose normal place or residence was in the State of Hawaii. (R. 209) That census also included: Military personnel stationed ashore in the area, ships' crews (both civilian and military) in ports of the area in question on the census date, regardless of their legal or voting residence or the transient nature (R. 209), persons in transient accommodations (hotels, trailers, camps, etc.) if they

have no regular place or residence or are in the process of changing residence (R. 209-10), local residents temporarily out of the State on business or vacation, students from other areas attending a local university, regardless of legal or voting residence (R. ~~211~~ 230), and inmates of long-term institutions (mental hospitals, prisons, etc.). (R. 216) Thus, the census figures would readily distort the voting strength of the voters of those areas which include many of such usually non-voting and transient persons.

The difficulties attendant in the use of the federal census figures may be particularly unique to Hawaii in that there are large pockets of military and maritime personnel in certain areas constituting a sizeable proportion with respect to the total population within certain legislative districts.[21] As the court below found and acknowledged, "Hawaii has become the United States' military bastion for the entire Pacific and the military population in the State fluctuates violently as the Asiatic spots of trouble arise and disappear." (R. 71; 238 F. Supp., at 474) The United States Census Bureau data covering the military population in Hawaii for the last 25 years, clearly supporting the finding of the court below, are set forth as follows: (Pl. Ex. 15; R. 388, 260)

1940	30,000	1953	48,000
1941	48,000	1954	38,000
1942	136,000	1955	56,000
1943	200,000	1956	58,000
1944	407,000	1957	60,000
1945	355,000	1958	55,000
1946	65,000	1959	56,000
1947	38,000	1960	59,000
1948	33,000	1961	61,000
1949	31,000	1962	79,000
1950	21,000	1963	60,000
1951	44,000	1964	60,000
1952	55,000		

[21] Particularly the 8th, 9th, 10th, 11th and 13th representative districts. (Pl. Ex. 16; R. 391, 261).

The fluctuation of seismic proportions around 1944 was, of course, due to World War II after which followed a rapid personnel demilitarization until the military population had been reduced from 407,000 in 1944 to 21,000 in 1950. In the following year, 1951, the number of military personnel doubled and in the year next, 1952, almost tripled the 1950 figure. These were the years of the Korean conflict after which there followed a consistent and sharp reduction in 1954 to 38,000. Again in 1962 the military population of 79,000 represented a 20,000 increase after only two short years over the figure of 1960. It may be mere coincidence that the Viet Nam crisis follows the marked fluctuation in 1962.

The military population figures above do not include the military dependents. If we may assume that there is a reasonable correlation between the fluctuation of the military personnel and their dependents, then there would, of course, be a more pronounced effect of the fluctuation of the military population on the total population.

It is also instructive to note that at least 90% of the military population in 1960 were concentrated in the fifth senatorial district and at least an aggregate of 90% in the eighth, ninth, tenth, eleventh and thirteenth representative districts.[22] (Pl. Ex. 16; R. 391, 261) The transient and fluctuating circumstances of the military personnel would thus render the concept of "population" somewhat elusive in these districts. Total population this year would not, from statis-

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[22] The Governor has pointed out deviations in the per cent registered among the 1960 civilian population. (Gov. 63) It is interesting to note that but for the areas in which the military are concentrated (8th, 9th, 10th, 11th and 13th representative districts) the deviations are slight. This can be more readily appreciated when we calculate the proportion of 1960 Federal Census

tical experience in Hawaii,[23] be total population next year so far as the military population is concerned. The fluctuation in military population is independent from and does not appear to have significant correlation to changes in civilian population so that it can hardly be deemed a temporary imbalance where the military are situate.

The District Court cited a possibility that could lead to absurd results by including the total population so that "areas which normally would have a total population entitling them to but a small percentage of the total number of legislators would suddenly find themselves controlling over 90% of the legislature..." (R. 72; 238 F. Supp., at 474-75) Admittedly the example was given in the context of the abnormal wartime situation in Hawaii in 1944, but the Governor does not deny such or similar possibility to a lesser degree.

The Governor has urged single-member districts. (R. 333) Given the present size of the House of Representatives and census population as the numerical base of representation, it would be possible to construct a representative district consisting of a military base or portion thereof which would have almost no voters. (R. 275)

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population registered in Hawaii among the senatorial districts as follows: (Pl. Ex. 1; R. 339)

Sen. Dist.	1960 Registered Voters	1960 Population	Per Cent Registered
1	19,266	44,297	43
2	6,793	17,035	40
3	17,539	42,855	41
4	73,981	182,307	41
5	73,142	318,102	23*
6	11,338	28,176	40

* 90% of the military population in 1960 were concentrated in the 5th senatorial district. (Pl. Ex. 16; R. 391, 261).

[23] Pl. Ex. 15; R. 388, 260.

The use of the population basis in Hawaii not only results in the unintended and egregious results above but spawns another worry which hits at the heart of representation. More specifically the question is posed as to whether the apportionment of additional legislative seats to those areas in which the transient military and their dependents reside will actually result in providing members of these groups with representation in the legislative body or will simply result in weighting more heavily the representation of the registered voters residing in those specific areas. If the 1960 federal census were used as the base, instead of the registered voter basis, the ninth representative district, which includes Schofield Barracks, would be entitled to a greater number of legislative seats[24] based on 42,816 persons of which 11,883 are military personnel (not including military dependents). (Pl. Ex. 16; R. 391) Actually, however, such a district would have a relatively small voting population made up primarily of plantation workers living in and around Wahiawa and small business and professional men of that community serving the military population plus a small number of soldiers and their families who happen to be Hawaii residents. Although speculative, political realism would have the plantation workers and the small businessmen select representatives who would primarily represent their interests over the concerns of the transient military population. The likely result is that one would simply weight the vote of this portion of Hawaii's registered voter population several times that of those voters within a district not favored with the presence of the transient military population. Such

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[24] 1960 registered voters numbered 7,410 in the ninth representative district constituting about 3.6% of the total number of registered voters of 202,059. The total population of the ninth representative district (42,816) was about 6.7% of the total population of the State (632,772). (Pl. Ex. 1; R. 339)

a situation may well court and foster the evolution of "rotten boroughs" where population is large but where there are only a few voters.

The right to have one's vote counted equally with that of every other voter and the right to be counted in the apportionment base are but two sticks in that bundle of a citizen's right to representation. Under the total population basis in the Hawaiian context, the voter's vote is unduly diluted, and under the registered voter basis, the non-voter's representation is diminished by exclusion from the apportionment base. Either basis will diminish, but not invidiously, one avenue of a citizen's right to representation. The choice of either of the bases would be a decisional exercise of the State in its attempt to order that over-all system that would best approach the equal protection ideal in representation. Hawaii has chosen the registered voter basis as one better suited to achieve equitable and meaningful representation under the circumstances peculiar to its community.

The registered voter basis provides a rational basis by which measure a more accurate and fair gauge of total population (non-transients) can be realized in Hawaii. Indiscriminate use of census figures without refinement to adjust to significant number of transients may not be a fair estimate of total population. The transients, who severely distort the population picture, should be excluded from the apportionment base.[25] The registered voter basis is a reasonable measure to identify and separate the transients because of the requirement of one year residence in Hawaii as a precondition to registration. The military personnel have a

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[25] The Governor would agree at least that "[i]f the census figures must be refined in order to obtain a fair estimate of the non-transient population of the State, then this should be done." (Gov. 68)

lower incidence of registration than those of other groups.[26] (Pl. Ex. 14; R. 368, 260) All members of the military are not *per se* excluded from registration as a class.[27] The military who are excluded are not excluded merely because of the nature of their employment but because of the transient circumstances and the fluctuating nature of their lot in Hawaii which disturbs total population and hence the apportionment base to the detriment of the weight of the citizen's vote.

While it happens that the registered voter basis also excludes from the apportionment base (in addition to the civilian transients and military transients) residents of Hawaii who are either ineligible to vote and cannot register or qualified to vote but fail to register, the discrimination to such classes of persons is not invidious. Here the benefit we derive in arriving at a more realistic total population statistic and thereby achieving a more equitable representative system for Hawaii by the use of the registered voter basis far outweighs the discrimination reasonably imposed on those excluded from the apportionment base.

With respect to those residents who are qualified to vote but for their failure to register, their exclusion seems hardly

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[26] Voting qualifications in Hawaii include one year residence in the State (R. 276-77) which probably accounts for low registration among those of the military from other states fulfilling their draft obligations with a short tour of duty of say two years or less in Hawaii. Also many may choose not to seek residence in Hawaii but maintain their original legal and voting residence and vote for candidates in their home states.

[27] Hawaii continues to register such military personnel as are qualified. (R. 280-81) And the District Court found that "if he so desires to become a resident of Hawaii . . . there is nothing in the State Constitution or the Hawaii statutes which per se excludes members of the armed forces from establishing their residence in Hawaii and thereafter becoming eligible to vote." (R. 73; 238 F. Supp., at 475)

discriminatory in the light of their opportunity to be included in the apportionment base by the simple act of registration. The District Court found "no scheme in Hawaii's Constitution or in the statutes implementing the exercise of franchise which is aimed at disenfranchising the military or any other group of citizens." (R. 73; 238 F. Supp., at 475) Concerted efforts were made by the office of the clerk of the City and County of Honolulu to register as many persons possible of those so qualified by recruiting volunteer registrars and locating them at various points for the convenience of registrants, by distributing information sheets on registration procedures and locations of registration points, and by public advertisements on registration in the daily newspapers. (R. 278) No more effort is being asked of the citizen for his inclusion in the apportionment base than is required by the State for the inclusion of his name on the voting rolls.

For those persons who are ineligible to vote and cannot register, their exclusion may be reasonably founded not only on expedience but on grounds touching and concerning a State's effort to achieve better forms of representation. The illiterate and the children are included among those persons who are ineligible to vote in Hawaii. (R. 276) The Governor would concede to governmental limitation on the right to vote by the illiterate and the children to guarantee mature and informed judgment by the electorate. (Gov. 48) Exclusion of the illiterate and children from the apportionment base appears no more discriminatory. It may be that the reason to disqualify the illiterate and the children from voting has no apparent relevance to their exclusion from the apportionment base. There is, however, a subtle but important interdependence between the right to vote and the right to be included in the apportionment base. Effective and meaningful representation may not necessarily be achieved

by being counted in the apportionment base without the right to vote. Let us assume, for example, that an additional legislative seat is apportioned to a district as a result of the inclusion of the illiterate and the children, who are disqualified from voting, in the apportionment base. The representative elected to occupy that seat does not, in fact and in the minds of the illiterate and the children, adequately represent their interests. What is the remedy? Unlike a voter who may vote for someone else in the next election, the illiterate and the children have no such remedy and must be resigned to their lot of having a "representative" indifferent to their needs. Representative government surely must include legislators responsive to the constituents and surely must include device and opportunity for a timely check on disaffection of constituents by legislators. The right to vote provides such a check as illustrated above. Meaningful representation to a class of persons is not necessarily achieved simply by their inclusion in the apportionment base. It must be coupled with the right to vote, without which representation can be wholly illusory. As the illiterate and the children are disqualified from voting in Hawaii, the State may well be justified in excluding them from the apportionment base. *Cf. McGowan* v. *Maryland*, 366 U.S. 420 (1961).

It is submitted therefore that not only is the registered voter basis permissible under a legislative apportionment plan but, with respect to the State of Hawaii with its significant transient population, it is far less egregious in its effects on citizens, qualified voters, residents and inhabitants, than any total population basis.

The use of the "registered voters" measure in Hawaii does not invidiously discriminate against any group of persons.

The Governor contends that the "registered voters" measure discriminates invidiously against certain groups, namely, the poor (Gov. 60-61), the illiterate (Gov. 61-62), the

children (Gov. 62) and the military (Gov. 63) by their exclusions from the apportionment base or by their residence in districts of those persons excluded.

The Governor's contentions have a certain emotional appeal, interestingly presented, but only so meritorious. As we have argued and demonstrated earlier, Hawaii may in rational manner exclude certain persons from the apportionment base in the process of devising a representative system for the State. Even if we were to assume without conceding that the use of the registered voter basis must be predicated on a mathematical correlation between registered voter population and total population from district to district, the Governor has not demonstrated that the total population was not adequately reflected as there is nothing in the record showing the total population for the year 1958 to compare with the 1958 registered voter population, the basis on which the present House apportionment occurred in 1959. On this the court below correctly perceived and noted:

> "Plaintiffs urge and have presented figures showing that on the basis of the 1960, 1962 and 1964 population, the house of representatives is malapportioned. To begin with, paraphrasing *Guntert* v. *Richardson*, *supra*, 1950 and 1958 registered voters, and 1960, 1962 and 1964 population, are not comparable figures. The Court does not demand that legislatures be reapportioned annually. *Reynolds* v. *Sims*, *supra*, Subject VIII. This Court, at this time, can only determine if the basis of apportionment, when adopted in 1950 and when used for reapportionment in 1959, did in fact at those times result in apportionment 'substantially on a population basis.'" (R. 68; 238 F. Supp., at 473)

Moreover, the application and relevance of other statistics which the Governor presents are suspect. In attempting to show that the registered voter basis discriminates against

the poor, the Governor cites that among the eligible voters on Oahu with a family income of less than $4,000 only 43.8% were registered while among those in the $15,000 or more bracket, 77.7% were registered. (Gov. 61) In *Griffin* v. *Illinois*, 351 U.S. 12 (1956), which the Governor cites, the defendant, convicted of armed robbery, could not achieve an appeal because of his inability to pay for a transcript necessary to pursue the appeal. The appeal depended on whether or not one could afford the costs thereof. In the instant case, there is no cost involved to registration so that inability to pay is of no consequence. The act of registration in Hawaii can be accomplished with equal facility and opportunity by persons of all economic classes. (R. 276-77) Simply because the proportion of registered persons in the lower economic class turned out to be less than those in the higher is not at all persuasive to show invidious discrimination. It is noted that the Governor chooses not to assert that the registered voter basis discriminates against those with 13 or more school grades whose registration percentage among the eligibles is 58.7% as compared to those with 8 or less school grades whose registration percentage is 73.9%. (Pl. Ex. 14; R. 368, 260).

D. The District Court Properly Held That the Multi-Member Districting of the House of Representatives Comported With the Equal Protection Clause.

The Governor urges that the apportionment of the Hawaii House of Representatives should have been declared unconstitutional because of its multi-member districts. (Gov. 70) In Part I, subpart A, we developed that multi-member districts are valid in both houses, provided that population is the controlling consideration and provided that no one has demonstrated that the apportionment scheme operates to minimize or cancel out the voting strength of racial, political, social and economic elements of the voting population.

The District Court found that the districting of the House of Representatives was not invidious and followed along historical, political, geographic and physical lines. (R. 75; 238 F. Supp., at 476) It also found that the apportionment was not the result of arbitrary and capricious action. (R. 79-80; 238 F. Supp., at 478-79) To be sure, districting and apportionment to achieve substantial equality of population may well be at once rational and arbitrary. In a given situation the legislators may be confronted with two or more rational choices in constructing the district lines. To that extent the legislators perforce arbitrarily make one rational choice over another.

It is contended that, as a matter of political theory, a person in a multi-member district has an inordinate political advantage over a person in a single-member district, and the six-member 15th Representative District is cited as an example. (Gov. 76-77) But there is no showing that the 15th Representative District has displayed inordinate political power as compared with the lesser-member representative districts on Oahu or in the State.

The Governor further contends that the multi-member districts of the House deny equal protection to the minorities therein. (Gov. 80) As we have developed in Part I, subparts A and B, the record does not manifest which minorities, if any, are in fact submerged. The record is also barren of any evidence that any minority has been deprived of a chance to elect a representative. In any event a representative, because his tenure depends on the entire electorate of the district, must be vigilant to serve all the people of the diverse groups in the district which he represents. *Fortson* v. *Dorsey*, 379 U.S. 433, 438 (1965).

Moreover, in *Mann* v. *Davis*, 245 F. Supp. 241 (E. D. Va. 1965), *aff'd sub nom. Burnette* v. *Davis*, Nos. 241, 424, O. T. 1965, October 25, 1965, certain Richmond Negro residents

complained of the multi-member districting of the City of Richmond in both chambers. The City of Richmond was combined with Henrico County to form an eight-member House of Delegates district. The City of Richmond formed a two-member Senate district. These residents contended that such multi-member districting deprived the Negro minority of a chance to elect one of their race to the General Assembly. They contended that the City of Richmond should be divided into five single-member House of Delegates districts and two single-member Senate districts. The District Court held that the Equal Protection Clause does not demand single-member districting in either or both chambers to assure the success at the polls of any racial minority.

E. If the Senate Plan Had Not Been Violative of the Fourteenth Amendment, the District Court Should Have Approved Such Reapportionment.

The District Court in its order of February 17, 1965, declared that the Hawaii Senate was malapportioned and imposed its injunction against the legislators from enacting any legislation until legislation looking toward the convening of a constitutional convention has been passed. (R. 80; 238 F. Supp., at 479) Thereafter the legislators moved the District Court to amend its order to allow the Hawaii Legislature to enact a reapportionment plan to be submitted to the District for its approval. (R. 83-85) The District Court amended its order accordingly. (R. 88-91) On April 28, 1965, the District Court disapproved the reapportionment plan, which the legislature had submitted, and declared that the plan failed to meet federal constitutional requisites. (R. 162-63, 164; 240 F. Supp., at 731, 732) The Governor has argued that even if the Senate plan had not been violative of the Fourteenth Amendment, the District Court's refusal to approve it should be sustained. (Gov. 104)

We contend that the District Court properly used as its test

of approval the Fourteenth Amendment. Reapportionment is primarily a matter for legislative consideration and determination. *Reynolds* v. *Sims*, 377 U.S. 533, 586 (1964); *Maryland Committee* v. *Tawes*, 377 U.S. 656, 676 (1964). Because the legislators are the representatives of their community, they have the primary responsibility to construct a reapportionment plan which they deem will fulfill the desires and needs of the community. In scrutinizing a legislative reapportionment plan, a District Court must not reject such plan because of its own notions of the ideal scheme within federal constitutional limits. The proper test of approval is whether the legislative plan comports with the Equal Protection Clause.

To be sure, the District Court has a wide range of discretion in fashioning decrees to remedy malapportionment. Judicial relief, however, becomes appropriate only when a legislature has failed to reapportion according to federal constitutional requisites. *Reynolds* v. *Sims*, 377 U.S. 533, 586 (1964).

CONCLUSION

For the reasons stated, paragraphs 1, 2 and 3 of the decision and order of the District Court dated February 17, 1965, should be affirmed, and paragraph 4 of said decision and order should be reversed. The decision and order of the District Court dated April 28, 1965, should be reversed; and the Legislature's Senate plan, Act 281, Regular Session 1965, Third Legislature of the State of Hawaii, should be declared valid in accordance with the Equal Protection Clause.

Respectfully submitted,

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APPENDICES

APPENDIX A

Constitutional Provisions and Statute Involved

1. Amendment XIV, Section 1, Constitution of the United States.

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. Article III, Sections 1, 2, 3, 4, 5 and 11 of the Constitution of the State of Hawaii.

ARTICLE III

THE LEGISLATURE

Legislative Power

Section 1. The legislative power of the State shall be vested in a legislature, which shall consist of two houses, a senate and a house of representatives. Such power shall extend to all rightful subjects of legislation not inconsistent with this constitution or the Constitution of the United States.

Senate; Districts; Composition

Section 2. The senate shall be composed of twenty-five members, who shall be elected by the qualified voters of the

respective senatorial districts. The districts, and the number of senators to be elected from each, shall be as follows:

First senatorial district: that portion of the island of Hawaii known as Puna, Hilo and Hamakua, five;

Second senatorial district: that portion of the island of Hawaii known as Kau, Kona and Kohala, two;

Third senatorial district: the islands of Maui, Molokai, Lanai and Kahoolawe, five;

Fourth senatorial district: that portion of the island of Oahu lying east and south of Nuuanu Street and Pali Road and the upper ridge of the Koolau Range from the Nuuanu Pali to Makapuu Point and all other islands not specifically enumerated, five;

Fifth senatorial district: that portion of the island of Oahu lying west and north of the fourth senatorial district, five; and

Sixth senatorial district: the islands of Kauai and Niihau, three.

House of Representatives; Composition

Section 3. The house of representatives shall be composed of fifty-one members, who shall be elected by the qualified voters of the respective representative districts. Until the next reapportionment, the representative districts and the number of representatives to be elected from each shall be as set forth in the Schedule.

Reapportionment of House

Section 4. On or before June 1 of the year 1959, and of each tenth year thereafter, the governor shall reapportion the members of the house of representatives in the following manner: The total number of representatives shall first

be reapportioned among four basic areas, namely, (1) the island of Hawaii, (2) the islands of Maui, Molokai, Lanai and Kahoolawe, (3) the island of Oahu and all other islands not specifically enumerated, and (4) the islands of Kauai and Niihau, on the basis of the number of voters registered at the last preceding general election in each of such basic areas and computed by the method known as the method of equal proportions, no basic area to receive less than one member. Upon the determination of the total number of representatives to which each basic area is entitled, such total shall be reapportioned among the one or more representative districts within each basic area on the basis of the number of voters registered at the last preceding general election within each of such representative districts and computed by the method known as the method of equal proportions, no representative district to receive less than one member. Upon any reapportionment, should the total number of voters registered in any representative district be less than one-half of the quotient obtained by dividing the total number of voters registered in the State by the total number of members to which the house is entitled, then, as part of such reapportionment, the basic area within which such representative district lies shall be redistricted by the governor in such manner that the total number of voters registered in each new representative district therein shall be more than one-half of such quotient.

The governor shall thereupon issue a proclamation showing the results of such reapportionment, and such reapportionment shall be effective for the election of members to such house for the next five succeeding legislatures.

Mandamus

Original jurisdiction is hereby vested in the supreme court of the State to be exercised on the application of any regis-

tered voter, made within thirty days following the date specified above, to compel, by mandamus or otherwise, the governor to perform the above duty; and made within thirty days following the date of such proclamation, to compel, by mandamus or otherwise, the correction of any error made in such reapportionment.

Election of Members; Term

Section 5. The members of the legislature shall be elected at general elections. The term of office of members of the house of representatives shall be two years beginning with their election and ending on the day of the next general election, and the term of office of members of the senate shall be four years beginning with their election and ending on the day of the second general election after their election.

* * *

Sessions

Section 11. Regular sessions of the legislature shall be held annually. The governor may convene the legislature, or the senate alone, in special session. All sessions shall be held at the capital of the State. In case the capital shall be unsafe, the governor may direct that any session shall be held at some other place. Regular sessions in odd numbered years shall be known as "general sessions" and regular sessions in even numbered years shall be known as "budget sessions."

Budget Sessions

At budget sessions the legislature shall be limited to the consideration and enactment of the general appropriations bill for the succeeding fiscal year and bills to authorize proposed capital expenditures, revenue bills necessary therefor, urgency measures deemed necessary in the public interest, bills calling elections, proposed constitutional amendments

and bills to provide for the expenses of such session and the special session to be convened thereafter in accordance with the provisions of Section 17 of this article. The legislature may also consider and act upon matters relating to the impeachment or removal of officers. No urgency measure shall be considered unless a statement of facts constituting such urgency shall be set forth in one section thereof and until such section shall have been first approved by each house. The approval of such section and the final passage of such measure in each house shall require a two-thirds vote of all the members to which such house is entitled, taken by ayes and noes and entered upon its journal.

Sessions; Commencement; Duration

Regular sessions shall commence at 10:00 o'clock A.M., on the third Wednesday in February. General sessions shall be limited to a period of sixty days and budget sessions and special sessions to a period of thirty days, but the governor may extend any session for not more than thirty days. Sundays and holidays shall be excluded in computing the number of days of any session.

3. Article XVI, Section 1, of the Constitution of the State of Hawaii.

ARTICLE XVI

SCHEDULE
REPRESENTATIVE DISTRICTS

Description; Number of Members

Section 1. As provided in Section 3 of Article III until the next reapportionment, the representative districts and the number of members to be elected from each shall be as follows:

First representative district: that portion of the island of Hawaii known as Puna, one representative;

Second representative district: that portion of the island of Hawaii known as South Hilo, four representatives;

Third representative district: that portion of the island of Hawaii known as North Hilo and Hamakua, one representative;

Fourth representative district: that portion of the island of Hawaii known as Kau and South Kona and that portion of North Kona, for convenience herein referred to as Keauhou, more particularly described as follows: from a point at the seashore between the lands of Holualoa 1 and 2 and Puapuaa 2 running northeasterly along the boundary of Holualoa 1 and 2 to Puu Laalaau; (2) easterly in a straight line to a point called "Naohueleelua" being the common corner of the lands of Puuanahulu, Kaohe and Keauhou 2nd; (3) southeasterly along the common boundary between Hamakua and North Kona districts to the summit of Mauna Loa; (4) westerly along the common boundary between Kau and North Kona districts to the easterly boundary of South Kona district; (5) northerly and westerly along the boundary between North and South Kona districts to the seashore; and (6) northerly along the seashore to the point of beginning, one representative;

Fifth representative district: that portion of the island of Hawaii known as Kohala and that portion of North Kona not included in the fourth representative district, one representative;

Sixth representative district: the islands of Molokai and Lanai, one representative;

Seventh representative district: the islands of Maui and Kahoolawe, five representatives;

Eighth representative district: that portion of the island of Oahu known as Koolaupoko and Koolauloa, two representatives;

Ninth representative district: that portion of the island of Oahu, for convenience herein referred to as Waialua and Wahiawa and a portion of Ewa known as Kunia and Waipio, more particularly described as follows:

Beginning at the seashore on the boundary between the Ahupuaas of Waimea and Pupukea and following along the North boundary of the Ahupuaa of Waimea to Puu Kainapuaa on the Koolau Range at the junction of the Ahupuaas of Laie, Waimea and Kawailoa, thence southeasterly along the top of the Koolau Range, passing over Puu Pauao and Puu Kaaumakua to the head of Kipapa Gulch, thence down along Kipapa Gulch in all its turnings and windings to Waiahole Ditch, thence southwesterly along Waiahole Ditch in all its turnings and windings to Reservoir No. 31 of the Oahu Sugar Company, thence following a direct line to Puu Palikea on the Waianae Mountain Range, thence northwesterly following along the top of Waianae Mountain Range, passing over Puu Kaua, Puu Kanehoa, Puu Hapapa, Puu Kumakalii, Puu Kalena, Puu Kaala to Puu Pueo, thence westerly along the boundary between the Ahupuaas of Kaena and Keawaula to the seashore at Kaena Point, thence easterly along the seashore to the point of beginning, two representatives;

Tenth representative district: that portion of the island of Oahu, for convenience herein referred to as Ewa (excluding Kunia and Waipio) and Waianae, more particularly described as follows:

Beginning at the seashore at Kaena Point, on the boundary between the Ahupuaas of Kaena and Keawaula, and following along said boundary to Puu Pueo on the Waianae

Mountain Range, thence southeasterly along the top of the Waianae Mountain Range, passing over Puu Kaala, Puu Kalena, Puu Kumakalii, Puu Hapapa, Puu Kanehoa, Puu Kaua to Puu Palikea, thence following a direct line to Reservoir No. 31 of the Oahu Sugar Company, thence northeasterly along the Waiahole Ditch in all its turnings and windings to Kipapa Gulch, thence up along Kipapa Gulch in all its turnings and windings to the top of the Koolau Range, thence southeasterly along the top of the Koolau Range to the boundary between the Ahupuaas of Halawa and Moanalua, thence southwesterly along the boundary between the Ahupuaas of Halawa and Moanalua to the seashore, thence westerly along the seashore to the point of beginning, four representatives;

Eleventh representative district: that portion of the island of Oahu, for convenience herein referred to as Kalihi, more particularly described as follows: from the intersection of Kalihi and Auiki Streets running westerly along Auiki Street to Mokauea Street; (2) southwesterly along Mokauea Street Extension extended to a point on the outer edge of the reef; (3) westerly along the outer edge of the reef to a point on the Moanalua-Halawa boundary; (4) northerly and northeasterly along the Moanalua-Halawa boundary to the top of Koolau Range; (5) southeasterly along the top of Koolau Range to a place called "Puu Lanihuli"; (6) southwesterly along the top of the ridge between the lands of Kalihi, Kapalama and Nuuanu to Kalihi Street; and (7) southwesterly along Kalihi Street to the point of beginning, three representatives;

Twelfth representative district: that portion of the island of Oahu, for convenience herein referred to as upper Nuuanu, more particularly described as follows: from the intersection of King and Kalihi Streets running northeasterly along Kalihi Street to the ridge between the lands of Kalihi,

Kapalama and Nuuanu; (2) northeasterly along the top of said ridge to a point on the Koolau Range called "Puu Lanihuli"; (3) easterly along the top of said Range to Pali Road at the Nuuanu Pali; (4) southwesterly along Pali Road to Nuuanu Avenue and southwesterly along Nuuanu Avenue to School Street; (5) northwesterly along School Street to the center line of the Kapalama Drainage Canal (Waikiki Branch); (6) southwesterly along said Canal to the center line of the main Kapalama Drainage Canal; (7) southwesterly along said Canal to King Street; and (8) northwesterly along King Street to the point of beginning, three representatives;

Thirteenth representative district: that portion of the island of Oahu, for convenience herein referred to as Kapalama, more particularly described as follows: from the junction of the Honolulu Harbor Channel and the reef running westerly along the outer edge of the reef to Mokauea Street Extension extended; (2) northeasterly along Mokauea Street Extension extended to Sand Island Road; (3) northeasterly along Mokauea Street Extension to Auiki Street; (4) easterly along Auiki Street to Kalihi Street; (5) northeasterly along Kalihi Street to King Street; (6) southeasterly along King Street to the center line of the main Kapalama Drainage Canal; (7) northerly along said Canal to the center line of the Kapalama Drainage Canal (Waikiki Branch); (8) northeasterly along said Canal to School Street; (9) southeasterly along School Street to Nuuanu Avenue; (10) southwesterly along Nuuanu Avenue to the sea; and (11) southwesterly along the middle of Honolulu Harbor and Honolulu Harbor Channel to the point of beginning, three representatives;

Fourteenth representative district: that portion of the island of Oahu for convenience herein referred to as Pauoa, more particularly described as follows: from the junction

of the Honolulu Harbor Channel and the outer edge of the reef running northeasterly along the middle of Honolulu Harbor Channel and Honolulu Harbor to the intersection of Queen Street and Nuuanu Avenue; (2) northeasterly along Nuuanu Avenue to Pali Road and northeasterly along Pali Road to the top of the Koolau Range at the Nuuanu Pali; (3) easterly and southerly along the top of the Koolau Range Range to a point called "Puu Konahuanui"; (4) southwesterly along the top of the ridge between the lands of Nuuanu, Pauoa and Manoa to a mountain peak called "Puu Ohia" or "Tantalus"; (5) southwesterly along the top of the ridge between the lands of Makiki and Kalawahine to the intersection of Nehoa Street and Lewalani Drive; (6) southerly along Lewalani Drive and Piikoi Street to Wilder Avenue; (7) easterly along Wilder Avenue to Punahou Street; (8) southerly along Punahou Street to King Street; (9) westerly along King Street to Kalakaua Avenue; (10) southerly along Kalakaua Avenue to the center line of the Ala Wai Canal; (11) westerly along said Canal and along the line of said Canal extended to the outer edge of the reef; and (12) westerly along the outer edge of the reef to the point of beginning, five representatives;

Fifteenth representative district: that portion of the island of Oahu, for convenience herein referred to as Manoa and Waikiki, more particularly described as follows: from the intersection of Kalakaua Avenue and the center line of the Ala Wai Canal running northerly along Kalakaua Avenue to King Street; (2) easterly along King Street to Punahou Street; (3) northerly along Punahou Street to Wilder Avenue; (4) westerly along Wilder Avenue to Piikoi Street; (5) northerly along Piikoi Street to Lewalani Drive; (6) northerly along Lewalani Drive to Nehoa Street; (7) northeasterly along the top of the ridge between the lands of Makiki and Kalawahine to a mountain peak called "Puu

Ohia" or "Tantalus"; (8) northeasterly along the top of the ridge between the lands of Pauoa, Manoa and Nuuanu to a point on the Koolau Range called "Puu Konahuanui"; (9) southeasterly along the top of said Range to a place called "Mt. Olympus"; (10) southwesterly along the top of Waahila Ridge to the top edge of Palolo Valley; (11) southwesterly along the top edge of said Valley to the forest reserve boundary; (12) southwesterly along the southeasterly boundary of St. Louis Heights Tract, Series 2 (File Plan 464) to the southerly boundary of said Tract 100 feet southeasterly from Alencastre Street; (13) southwesterly parallel to and 100 feet from Alencastre Street and St. Louis Drive to Waialae Avenue; (14) westerly along Waialae Avenue to Kapahulu Avenue extended; (15) southerly across Waialae Avenue and along Kapahulu Avenue to Kalakaua Avenue; (16) westerly along Kapahulu Avenue extended to the outer edge of the reef; (17) northwesterly along the outer edge of the reef to a point on the line extended of the center line of the Ala Wai Canal; and (18) easterly along said line to the point of beginning, six representatives;

Sixteenth representative district: that portion of the island of Oahu, for convenience herein referred to as Kaimuki and Kapahulu, more particularly described as follows: from a point at the seacoast at a place called "Black Point" running westerly along the seacoast to Kapahulu Avenue extended to the sea; (2) easterly across Kalakaua Avenue and easterly and northerly along Kapahulu Avenue to Waialae Avenue; (3) easterly along Waialae Avenue to a point 100 feet easterly of St. Louis Drive; (4) northeasterly across Waialae Avenue then parallel to and 100 feet from St. Louis Drive and Alencastre Street to the southerly boundary of St. Louis Heights Tract, Series 2 (File Plan No. 464); (5) northeasterly along the southeasterly boundary of said Tract to the forest reserve boundary; (6) northeasterly along the top

ridge of Palolo Valley to the top of Waahila Ridge; (7) northeasterly along the top of Waahila Ridge to a point on the Koolau Range called "Mt. Olympus"; (8) easterly along the top of the Koolau Range to the top of the ridge between the lands of Waialae Nui and Palolo; (9) southwesterly along the top of said ridge to a place called "Kalepeamoa"; (10) southwesterly along Mauumae Ridge to Sierra Drive; (11) southwesterly along Sierra Drive to Waialae Avenue; (12) easterly along Waialae Avenue to 13th Avenue; (13) southwesterly along 13th Avenue and Ocean View Drive to Kilauea Avenue; (14) westerly along Kilauea Avenue to Makapuu Avenue; (15) southwesterly along Makapuu Avenue to Diamond Head Road; and (16) southeasterly along Diamond Head Road to the Military Road and along the Military Road extended to the point of beginning, four representatives;

Seventeenth representative district: that portion of the island of Oahu not included in any other representative district on the island of Oahu together with all other islands not included in any other representative district, three representatives;

Eighteenth representative district: the islands of Kauai and Niihau, four representatives.

Wherever a roadway, or the intersection of one or more roadways, is designated as a boundary in any of the above descriptions, the center line of such roadway or intersection is intended as such boundary.

4. Article XV of the Constitution of the State of Hawaii.

ARTICLE XV

REVISION AND AMENDMENT

Methods of Proposal

Section 1. Revisions of or amendments to this constitution may be proposed by constitutional convention or by the legislature.

Constitutional Convention

Section 2. The legislature may submit to the electorate at any general or special election the question, "Shall there be a convention to propose a revision of or amendments to the Constitution?" If any ten-year period shall elapse during which the question shall not have been submitted, the lieutenant governor shall certify the question, to be voted on at the first general election following the expiration of such period.

Election of Delegates

If a majority of the ballots cast upon such question be in the affirmative, delegates to the convention shall be chosen at the next regular election unless the legislature shall provide for the election of delegates at a special election.

Notwithstanding any provision in this constitution to the contrary, other than Section 3 of Article XIV, any qualified voter of the district concerned shall be eligible to membership in the convention.

Unless the legislature shall otherwise provide, there shall be the same number of delegates to such convention, who shall be elected from the same areas, and the convention shall be convened in the same manner, as nearly as practicable, as required for the Hawaii State Constitutional Convention of 1950.

Organization; Procedure

The convention shall determine its own organization and rules of procedure. It shall be the sole judge of the elections, returns and qualifications of its members and, by a two-thirds vote, may suspend or remove any member for cause. The governor shall fill any vacancy by appointment of a qualified voter from the district concerned.

Ratification; Appropriations

The convention shall provide for the time and manner in which the proposed constitutional revision or amendments shall be submitted to a vote of the electorate, but no such revision or amendments shall be effective unless approved at a general election by a majority of all of the votes tallied upon the question, such majority constituting at least thirty-five percent of the total vote cast at such election, or at a special election by a majority of the total vote tallied upon such quesion, such majority constituting at least thirty-five percent of the total number of registered voters; provided, that no constitutional amendment altering this proviso or the representation from any senatorial district in the senate shall become effective unless it shall also be approved by a majority of the votes tallied upon the question in each of a majority of the counties.

The provisions of this section shall be self-executing, but the legislature shall make the necessary appropriations and may enact legislation to facilitate their operation.

Amendments Proposed by Legislature

Section 3. The legislature may propose amendments to the constitution by adopting the same, in the manner required for legislation, by a two-thirds vote of each house on final reading at any session, after either or both houses shall have given the governor at least ten days' written notice of the

final form of the proposed amendment, or, with or without such notice, by a majority vote of each house on final reading at each of two successive sessions.

Upon such adoption, the proposed amendments shall be entered upon the journals, with the ayes and noes, and published once in each of four successive weeks in at least one newspaper of general circulation in each senatorial district wherein such a newspaper is published, within the two months' period immediately preceding the next general election.

At such general election the proposed amendments shall be submitted to the electorate for approval or rejection upon a separate ballot.

The conditions of and requirements for ratification of such proposed amendments shall be the same as provided in Section 2 of this article for ratification at a general election.

Veto

Section 4. No proposal for amendment of the constitution adopted in either manner provided by this article shall be subject to veto by the governor.

5. Act 281, Regular Session 1965, Third Legislature of the State of Hawaii.

A BILL FOR AN ACT
PROVIDING FOR THE PROVISIONAL REAPPORTIONMENT OF THE SENATE OF THE STATE OF HAWAII

Be it enacted by the Legislature of the State of Hawaii:

Section 1. *Senate; Districts; Composition.* The Senate shall be composed of twenty-five members, who shall be

elected by the qualified voters of the respective senatorial districts. Until the next reapportionment, the senatorial districts, and the number of senators to be elected from each, shall be as follows:

"Senate; Districts; Composition

Section 2. The Senate shall be composed of twenty-five members, who shall be elected by the qualified voters of the respective senatorial districts. Until the next reapportionment, the senatorial districts, and the number of senators to be elected from each, shall be as follows:

First senatorial district: the island of Hawaii, three;

Second senatorial district: the islands of Maui, Molokai, Lanai and Kahoolawe, two;

Third senatorial district: that portion of the island of Oahu consisting of the eighth representative district as described in the Schedule, Article XVI, Section 1, of the Constitution of the State of Hawaii, as amended, three;

Fourth senatorial district: that portion of the island of Oahu consisting of the ninth and tenth representative districts as described in the said Schedule and the first and the eighth precincts of the eleventh representative district as described in the governor's proclamation issued September 11, 1964, for the 1964 general election, four;

Fifth senatorial district: that portion of the island of Oahu consisting of the twelfth and thirteenth representative districts as described in the said Schedule and the second through seventh precincts, inclusive, and the ninth through twelfth precincts, inclusive, of the elev-

enth representative district, and the first through fifth precincts, inclusive, and the eighth, eleventh, fifteenth and sixteenth precincts of the fourteenth representative district as described in the said proclamation, four;

Sixth senatorial district: that portion of the island of Oahu consisting of the fifteenth representative district as described in the said Schedule and the sixth, seventh, ninth and tenth precincts and the twelfth through fourteenth precincts inclusive, of the fourteenth representative district as described in the said proclamation, four;

Seventh senatorial district: that portion of the island of Oahu consisting of the sixteenth and seventeenth representative districts as described in the said Schedule, four;

Eighth senatorial district: the islands of Kauai and Niihau, one."

Section 2. On or before June 1, of the year 1975, and of each tenth year thereafter, the governor shall reapportion the members of the senate in the following manner: The total number of senators shall first be reapportioned among four basic areas, namely, (1) the island of Hawaii, (2) the islands of Maui, Molokai, Lanai and Kahoolawe, (3) the island of Oahu and all other islands not specifically enumerated, and (4) the islands of Kauai and Niihau on the basis of the number of voters registered at the last preceding general election in each of such basic areas and computed by the method known as the method of equal proportions, no basic area to receive less than one member. Upon the determination of the total number of senators to which each basic area is entitled, such total shall be reapportioned among the one or more senatorial districts within each basic area on the basis of the number of voters registered at the

last preceding general election within each of such senatorial districts and computed by the method known as the method of equal proportions, no senatorial district to receive less than one member. Upon any reapportionment, should the total number of voters registered in any senatorial district be less than one-half of the quotient obtained by dividing the total number of voters registered in the State by the total number of members to which the senate is entitled, then, as part of such reapportionment, the basic area within which such senatorial district lies shall be redistricted by the governor in such manner that the total number of voters registered in each new senatorial district therein shall be more than one-half of such quotient, provided, however, that there shall be at least one senatorial district in each basic area.

Upon completion of the reapportionment of the senate as provided herein, the governor shall issue a proclamation showing the results thereof.

Except as otherwise provided hereinafter, the initial reapportionment shall be effective for the election of members to the senate in 1976 and shall remain in effect for succeeding senatorial elections until the next reapportionment takes effect. Except as otherwise provided hereinafter, any subsequent reapportionment shall be effective for the election of members to the senate in the year next following such reapportionment and shall remain in effect for succeeding senatorial elections until the next reapportionment takes effect.

An incumbent senator whose term of office does not expire until the second general election following the date of the proclamation, including any such senator whose seat has been apportioned to another district by reapportionment, shall be allowed to complete his four-year term; provided that when the seat of such holdover senator has been reapportioned to another district, the election to fill the new

seat in the district to which such seat has been newly apportioned shall not be held until the time of the second election following such proclamation.

Original jurisdiction is hereby vested in the supreme court of the State to be exercised on the application of any registered voter, made within thirty days following the date specified above, to compel, by mandamus or otherwise, the governor to perform the above duty; and made within thirty days following the date of such proclamation, to compel, by mandamus or otherwise, the correction of any error made in such reapportionment.

Section 3. The terms of all members of the senate elected or appointed prior to the general election of 1966 shall terminate on the date of the general election of 1966.

Members of the senate elected at the general election of 1966 shall be divided into two classes.

Members of the first class shall hold office for a term of four years beginning with their election and ending on the day of the second general election held thereafter.

Members of the second class shall hold office for a term of two years beginning with their election and ending on the day of the next general election held thereafter.

Upon the expiration of the aforesaid terms of office of members of the respective classes, the term of office of their successors shall be four years.

Of the members to which each senatorial district is entitled, one-half shall be members of the second class. If the total number of senators to which a senatorial district is entitled is not an even number, the number of members of the first class in such district shall be the quotient of said total number divided by two, rounded off to the next whole number. The remainder shall be members of the second class.

Membership in the first and second classes shall be determined by the number of votes cast for each senator in such district. The first class shall consist of those senators, in number corresponding with the number of members of the first class to which such district is entitled, who are elected with the highest number of votes from such district. The remaining senators elected shall constitute the second class.

The senator from a senatorial district that is entitled to one senator shall automatically be a member of the first class.

Section 4. This Act shall take effect upon approval by the Governor of the State of Hawaii and by the United States District Court for the District of Hawaii and shall remain in effect until superseded by constitutional amendment; provided that the regular election of 1966, shall be the first election held pursuant to the provisions herein.

APPENDIX B

Memorandum To Judge Pence From Judge Beeks

MEMORANDUM

To : *Judge Pence* Date: March 31, 1965
From : *Judge Beeks*
Subject : *Holt* v. *Richardson*

I discussed your proposed Decision and Order on Senate Reapportionment Plan of March 18, 1965, and your notes accompanying the same, in a telephone conference with Judge Jertberg on March 29th. Judge Jertberg, because of the fact that he was in Los Angeles without a secretary, asked me to convey to you our joint views, which are as follows:

1. Inasmuch as the Senate Reapportionment Plan of March 18, 1965, is not formally before us, we do not think that any decision and order should be filed because such decision and order would be purely advisory in nature.

2. We believe that the Senate should be redistricted into single senatorial districts, although we may approve two-member districts if, and only if, the legislature can affirmatively show substantial reasons therefor. There may very well be valid reasons for one or two 2-member districts in the neighboring islands but we perceive no justification whatsoever for other than single member districts on the Island of Oahu, particularly the heavily populated areas thereof.

We have no objection whatsoever to your making our views, as above expressed, informally known to all of the

parties but we are opposed to the entry of a written decision and order.

I again discussed this matter with Judge Jertberg, who is now back in Fresno, this morning, read him this memorandum and he signified his approval and concurrence.

It is our suggestion that you discuss the subject matter of this memorandum with counsel for all parties immediately upon receipt of same (I hope you receive it tomorrow) and thereafter arrange a conference call with both of us (Judge Jertberg will be in Fresno) at noon your time on Friday.

cc: *Judge Jertberg*
Fresno, Calif.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

Nos. 318, 323 and 409

JOHN A. BURNS, Governor of the State of Hawaii,

Appellant,

—v.—

WILLIAM S. RICHARDSON, *et al.*,

Appellees.

ELMER F. CRAVALHO, *et al.*,

Appellants,

—v.—

WILLIAM S. RICHARDSON, *et al.*,

Appellees.

KAZUHISA ABE, *et al.*,

Appellants,

—v.—

WILLIAM S. RICHARDSON, *et al.*,

Appellees.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

BRIEF FOR KAZUHISA ABE, et al.

OPINIONS BELOW

The opinions of the District Court from which this appeal is taken are as follows: Decision and Order, dated February 17, 1965, entered on April 9, 1965, reported at 238 F.Supp. 468, and appearing at R. 62-81; Decision and Order, dated and entered on April 28, 1965, reported at 240 F.Supp. 724, and appearing at R. 151-65.

An order dated and entered on March 9, 1965, which granted a motion to alter or amend the judgment of February 17, 1965, is unreported and appears at R. 88-91. An informal memorandum opinion, dated March 31, 1965, is attached as Appendix B to this brief, pp. 20a to 21a, *infra*.

JURISDICTION

The plaintiffs brought suit under 42 U.S.C. §§ 1983, 1988, 28 U.S.C. §§ 1343, and 28 U.S.C. §§ 2201, 2202. A three-judge District Court was convened pursuant to 28 U.S.C. §§ 2281 and 2284.

The District Court's first order, dated February 17, 1965, was entered on April 9, 1965 (R. 195). Upon motion of intervening-defendants (R. 83-88), the District Court issued an order, dated and entered on March 9, 1965 (R. 88-91), suspending temporarily its order of February 17, 1965. The District Court then issued its order dated and entered on April 28, 1965 (R. 151-65), which reinstated the provisions of the order of February 17, 1965.

Notice of appeal was timely filed by these appellants in Case No. 409 on May 7, 1965. (R. 184) Separate notices of appeal were timely filed by the Governor of Hawaii in Case No. 318 on May 3, 1965 (R. 165), and by Elmer F. Cravalho, et al., in Case No. 323 on May 7, 1965 (R. 180).

The Supreme Court of the United States has jurisdiction to review by direct appeal the decisions and orders of the District Court under the provisions of 28 U.S.C. §§ 1253 and 2101 (b).

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

The constitutional provisions and statute involved in this case are:

1. Amendment XIV, Section 1, Constitution of the United States.

2. Article III, Sections 1, 2, 3, 4 and 5, Constitution of the State of Hawaii.

3. Article XVI, Section 1, Constitution of the State of Hawaii.

4. Article XV, Sections 1, 2, 3 and 4, Constitution of the State of Hawaii.

5. Act 281, Session Laws of Hawaii, Regular Session of 1965, Vol. 1.

The texts of the above constitutional and statutory provisions are set forth in Appendix A (pp. 1a to 21a, *infra*).

QUESTIONS PRESENTED

The following questions are presented in the appeal of these appellants in Case No. 409.[1]

---

[1]This brief is not only an opening brief in Case No. 409, but an answering brief as well in Case No. 318, pursuant to stipulation among the parties (see p. 6, *infra*.). Thus, this brief discusses not only the questions raised by these Appellants in No. 409 but also those questions raised in the brief of Appellants in No. 318.

1. Where the Hawaii Legislature has reapportioned the Senate among senatorial districts containing substantially equal population per senator, does the Legislature have the burden of showing that the Senate reapportionment plan does not operate to minimize or cancel out the voting strength of political, social, economic or racial elements of the voting population and that it is otherwise constitutionally justifiable, or do the opponents of the plan have the burden of demonstrating that the plan is invidious or otherwise constitutionally invalid?

2. Did the District Court abuse its discretion in attempting judicially to structure and employ the various factors, other than population base, which enter into consideration in the development of fair and effective representation for all voters in the Hawaii Legislature?

3. Within the constitutional limitations imposed by "equal weight" and "equal population" principles, does the Fourteenth Amendment permit the exercise of political judgment in the fashioning, structuring, balancing and employment of other factors in the development of fair and effective representation for all voters in the State Legislature?

4. Does the Fourteenth Amendment to the Constitution of the United States require that at least one of the two houses of the Hawaii Legislature be apportioned on the basis of single-member districts unless valid and compelling reasons are shown for the creation of multi-member districts?

5. Does the fact that the geographical boundaries of certain senatorial districts of the Hawaii Legislature are identical to or coincide to a great degree with the geographical boundaries of certain representative districts cause the votes of Hawaii citizens to be unequal in weight

or otherwise violate the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States?

6. Was the District Court justified in finding that the Senate reapportionment plan (H.B. 987), submitted by the Hawaii Legislature to the District Court on April 14, 1965, was the result of gerrymandering and thus arbitrary and capricious and violative of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, simply because two or more incumbent Senators within some proposed multi-member districts happened to reside within short distances of each other?

7. Does the Fourteenth Amendment to the Constitution of the United States require the creation of legislative districts which are substantially homogeneous in racial, political, occupational, industrial, and socio-economic complexion, with each such grouping having potentially equal representation?

8. Did the District Court, in seeking to compel reapportionment, abuse its discretion through the employment of excessive and drastic measures, to-wit: prohibiting the Hawaii Legislature from enacting legislation essential to the normal operations of Hawaii State and municipal governments and essential for the continuation of programs necessary for the health and welfare of the people of Hawaii until such time as reapportionment legislation had been passed to the satisfaction of the District Court?

9. Does the legislature of the State of Hawaii have the power to enact at least temporary and provisional reapportionment legislation relating to the Hawaii Senate, pending the adoption of amendments to the Hawaii Constitu-

tion providing for the reapportionment of the Hawaii Senate which meet the requirements of the United States Constitution?

10. Did the District Court abuse its discretion in requiring that a permanent reapportionment plan for the Senate, at least, of the Hawaii Legislature be in effect by the November 1966 general elections, and by requiring that the State constitutional amendments necessary to bring about such permanent plan must be proposed by a constitutional convention rather than by the Legislature?

11. Does the Senate Reapportionment Plan submitted by the Hawaii Legislature to the District Court on April 14, 1965, violate the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States?

STATEMENT OF THE CASE

Case Nos. 318, 323 and 409 have been consolidated for purposes of appeal by order of this Court. (R. 412) By stipulation of the parties in all three cases, this brief is intended to serve as the opening brief of Appellants in No. 409 and at the same time as their answering brief in Case No. 318. For purposes of all three cases, Appellants in No. 409 accept substantially the Statement contained in the brief of Appellant in No. 318, with these additions:

District Court's February Order. With respect to the apportionment of the House of Representatives of the Hawaii Legislature, the District Court ruled: "The plaintiffs and intervening plaintiffs have failed to prove that the apportionment of the House of Representatives of the Legislature of the State of Hawaii causes any invidious discrimination in the weight of their vote or that such apportionment is the result of arbitrary or capricious action." (R. 79-80)

The Legislature's Senate Plan. On April 14, 1965, the Legislature, pursuant to the District Court's order of March 9, 1965, passed and sent to the District Court the following three bills: (1) H.B. 987 (now Act 281, Session Laws of Hawaii, Regular Session of 1965, Vol. 1) providing for provisional reapportionment of the Senate; (Appendix A, pp. 14a to 19a, *infra.*) (2) H.B. 773, a proposed constitutional amendment embodying the terms of the provisional plan; and (3) H.B. 986, a statute calling for the submission to the electorate at the 1966 general election of the question whether or not a constitutional convention should be convened.

H.B. 987 was the subject of the District Court's scrutiny and is the Senate Reapportionment Plan, the validity of which is the question before this Court. In the light of its decision on H.B. 987, the District Court did not find it necessary to pass on the validity of H.B. 773 and H.B. 986. (R. 164)

The District Court's Decision of April 28, 1965. The District Court found that the Senate Reapportionment Plan conformed to the standards of equal proportions. (R. 155; 240 F.Supp. at 727) It found that the proposed senatorial districts followed established geographical, historical and natural lines (R. 156, 157), and adhered to the principles of compactness and contiguity (R. 161). Robert Schmitt, the expert witness, was of the opinion that the senatorial districts were well thought out (R. 317) and that there was considerable amount of logic and meaningfulness in the district lines (R. 325). The District Court, however, nonetheless held the Senate Reapportionment Plan unacceptable and held that at least one house of the Hawaii bicameral Legislature must be apportioned among single-member districts (R. 162-63), that the districts must be homogeneous in their ethnic, socio-economic, political, industrial and oc-

cupational complexion and each such group must have potentially equal representation (R. 157-58) and that no senatorial district boundary lines may be identical or nearly identical to the boundary lines of any representative district (R. 160-61).

SUMMARY OF ARGUMENTS

I. The District Court erred in placing the burden upon the Legislature to justify its proposed Senate Reapportionment Plan and to justify the creation of multi-member districts for the Senate. Placing the burden upon the Legislators was contrary to the usual rules of procedure employed in Equal Protection cases whereby the one attacking the legislation from which unequal treatment is alleged to arise has the burden of demonstrating the invidiousness of the classification. This was especially so in the light of the adherence on the part of the Legislature to the equal-populations principle in the proposed reapportionment of the Senate.

II. The District Court erred in attempting to structure judicially those factors which are parts and parcels of any governmental system designed to achieve fair and effective representation for all citizens and the structuring of which entails policy determinations and judgmental decisions in the light of the political community's philosophy, experience and development and the existing state of affairs. The District Court left no room for judgment by the political community when it mandated that at least one house of a bicameral legislature must be apportioned on a single-member districting system, that the legislative districts must be homogeneous, based on the economic, social, occupational, industrial and ethnic characteristics of the people, and that the district boundaries of one house of the Hawaii Legislature must not be identical in all cases with the district

boundaries of the other house. The Legislature is but one facet of government which requires structuring in achieving fair and effective representation for all, and how the Legislature is apportioned depends to a great extent on the existing structure of these other facets and upon the shape of various relevant factors. All of the facets and factors are interrelated, and one cannot be structured without consideration of the structure of others, if fair and effective representation is to be achieved. The structuring and employment of these facets and relevant factors requiring judgmental decisions are best left to the judgment of the political body.

III. The Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States does not require that at least one house of the Hawaii Legislature be apportioned among single-member districts.

A. The District Court's holding that this is required was contrary to the holdings of this Court. *Fortson v. Dorsey*, 379 U.S. 433 (1965), expressly held that multi-member districts, without more, are not *per se* constitutionally invalid, especially if, on the face of the apportionment itself, there is substantial compliance with the equal-populations principle.

B. 1. Whether or not the State should apportion its Legislature on the single-member districting system or on the multi-member districting system rests in the judgment of the political community. After all, whether one system or the other is used depends on the body politic's philosophy of government and the role of the legislature, concept of "representative government," political realities, experience, and judgmental decisions on how best to achieve fair and effective representation for all citizens.

2. In the reapportionment of the Hawaii Senate, the Hawaii Legislature was governed by its policy determination that it would be in the best interest of the State to foster the election of legislators oriented toward the broad, state-wide problems rather than the election of legislators oriented toward narrow, local issues.

3. Moreover, in selecting multi-member districts for the Senate, the Hawaii Legislature took into consideration varied relevant factors. Factors such as the numerical size of the respective houses of the Hawaii Legislature, the population size of the Senatorial Districts, the frequency of reapportionment, trends in population shifts, and the relationship between the House and the Senate all influenced and dovetailed to fashion multi-member districts for the Senate. In the judgmental decision of the Legislature, single-member districts would have created senatorial districts too small in population size. Based on such policy determinations and judgmental decisions, it cannot be said that the multi-member districting of the Senate was invidious or lacking in rationale.

C. 1. The District boundaries of the proposed Hawaii Senate apportionment in and of themselves cannot be said to be invidious or arbitrary. Even if it is assumed that the drawing of the district boundaries resulted in some persons being discriminated against, it cannot be said that the discrimination was arbitrary. The boundaries followed geographical, historical, and natural lines, adhered to the principles of compactness and contiguity, and took into account centers of population concentration and existing communities. The result was that there was considerable amount of logic and meanir gfulness in the senatorial district boundary lines.

2. The senatorial districting caused one representative district and one senatorial district on Oahu to have identical

boundary lines, and another representative district and another senatorial district to have almost identical boundary lines. Even this result, however, was motivated by careful reasoning. Concerned that senatorial districts may be too small or too large in population size and wishing to avoid fashioning the districts in such manner that virtually all seven senatorial districts on Oahu would have the same boundary lines with the ten representative districts, the Hawaii Legislature exercised its reasonable judgment which resulted in only one senatorial district having the same boundary lines with a representative district, and that sameness in boundary lines was influenced by natural, geographical and historical considerations.

3. The District Court intimated that the senatorial districts were gerrymandered to protect the incumbent Senators. The record, however, is devoid of proof to justify such findings. Whether the single-member districting system or the multi-member districting system is used, there is no evidence that some incumbent Senators would not be advantaged.

D. The allegations of the Appellant in Case No. 318 that multi-member districts foster the overrepresentation of the larger multi-member districts, the submergence of minorities in the multi-member districts and the denigration of majority rule suffer from lack of evidence. The arguments are speculative at best.

1. Under the proposed reapportionment of the Hawaii Senate, if a voter in a multi-member district votes for four times as many Senators than a voter in a single-member district, it is because the voter in the multi-member district lives in a district where there are four times as many people as in the single-member district. As this Court stated in *Fortson v. Dorsey*, 379 U.S. 433 (1965), there is nothing invidious by this bare fact alone.

2. The fact that a multi-member senatorial district and a multi-member representative district have the same boundaries or substantially the same boundaries does not of itself cause any overrepresentation of that district. Again, the voter in that district votes for as many of the total number of Senators and Representatives as the population of that district bears to the total population of the State. On Oahu, even the smallest representative district votes for as many as six of the total number of Senators and Representatives and the largest district votes for a total of ten.

3. The record in this case is indeed barren of any evidence showing that minorities are submerged in multi-member districts. Who is in the majority and who is in the minority and what minority group is submerged are not identified, but left to speculation. Indeed, in any system of districting, whether single-member or multi-member, there will always be a minority and the potential of submergence of that minority is not any greater in a multi-member district than in a single-member district.

4. The principle of majority rule is not guaranteed by single-member districts. Majority rule is a problem in any system of districting. To simply assert that multi-member districting system denigrates majority rule without supportive evidence is to indulge in conjecture.

IV. The District Court erred in holding that the State Legislature must have legislative districts which are homogeneous in their ethnic, political, socio-economic, industrial and occupational complexion and that each such group have potentially equal representation in the State Legislature. This mandate effectively precludes the Hawaii Legislature from exercising its political judgment, in the light of the needs and interests of the State, to determine whether or

not the legislative districts should be homogeneous or heterogeneous in the populace complexion.

A. The Equal Protection Clause of the Fourteenth Amendment protects "persons," not interest groups or classes of people. Desirable though it may be to have group representation in the State Legislature, the right of groups to have such representation is not protected by the Equal Protection Clause.

B. 1. There are practical difficulties in any effort to apportion the Legislature among districts which are homogeneous in ethnic, socio-economic, political, industrial and occupational character. Which of the many varied interest groups are relevant and entitled to representation, which minorities are disadvantaged and to which interest group does a person belong are the kinds of questions raised in any effort to create homogeneous districts. There are no practical solutions to these questions.

2. Such practical difficulties are apparent in trying to apportion the Hawaii Legislature among districts homogeneous in character. Robert Schmitt, the expert called as a witness in the District Court found it extremely difficult to draw district boundary lines around homogeneous districts, even when census tract boundaries are used.

C. Homogeneous districts cannot be created and each such homogeneous groups cannot be given potentially equal representation in the State Legislature without dangerously subverting the equal-populations principle.

D. The role of groups is a problem in "representative government." The body politic is best equipped to determine policy questions relating to the role of interest groups and how best to structure the various facets of "representa-

tive government" to enable interest groups to have a real role in governmental process.

V. The District Court erred in enjoining the Hawaii Legislature from enacting any legislation, save such housekeeping legislation as necessary to keep the Legislature in session, until the Legislature enacted legislation, pursuant to the provisions of Article XV of the Hawaii Constitution, providing for the submission to the electorate, by a special election to be held not later than August 1, 1965, the question, "Shall there be a convention to propose a revision of or amendments to the constitution?" and for all acts required to implement such legislation. This drastic action prevents the Legislature from considering legislation essential for the health and welfare of the people of Hawaii and for the operation of the State and County governments. While the injunction was ostensibly aimed at the 1965 Regular Session of the Legislature, its language appears to be broad enough to apply to the oncoming 1966 Regular Session which convenes on February 16, 1966, unless the injunction is vacated. It does not appear that the injunction was justified nor was it in keeping with equitable principles.

VI. The District Court erred in other respects in fashioning remedies to bring about a valid apportionment of the Hawaii Legislature.

A. It erred in precluding the Hawaii Legislature from considering provisional reapportionment for the Legislature, pending the adoption of amendments to the Hawaii Constitution containing a federally constitutional apportionment plan for the Legislature.

B. It erred in precluding the Hawaii Legislature from proposing by legislation amendments to the Hawaii Constitution containing a permanent, acceptable apportion-

ment plan. The Hawaii Constitution provides for amendments to the Hawaii Constitution by one of two alternative routes: Constitutional convention or by Legislative proposals.

C. It erred in ordering that a constitutionally acceptable legislative apportionment plan be in effect for the 1966 general election. There is nothing in the record which suggests the necessity for such speed in fashioning a permanent apportionment plan for Hawaii to safeguard the constitutional rights of plaintiffs.

VII. The District Court correctly invalidated only that portion of Article III, Section 2, of the Hawaii Constitution relating to the apportionment of the Senate. Appellant in No. 318 contends that the District Court should have invalidated other portions of Article III, relating to the apportionment and reapportionment of the House of Representatives.

A. The District Court was not required under *Maryland Committee v. Tawes*, 377 U.S. 656 (1964) to invalidate that portion of the Hawaii Constitution relating to the apportionment of the House of Representatives merely because it had invalidated that portion relating to the apportionment of the Senate. While this Court must view the apportionment of any house of a bicameral legislature in the light of the apportionment of the other, the District Court had discretion to uphold the validity of the apportionment of the House in seeking to insure legislative apportionment which will comport with the requirements of the federal Constitution.

B. 1. The District Court correctly refused to invalidate that portion of the Hawaii Constitution relating to the numerical sizes of both houses of the Hawaii Legislature.

There is no magic in the numerical size of either house. The size of the respective houses is a question for the political body to determine. It cannot be said that the Hawaii Legislature would have created a State Senate or a State House of a different numerical size had the District Court invalidated that provision of the Hawaii Constitution.

2. The District Court was correct in not invalidating that portion of the Hawaii Constitution which "froze" the representative districts upon reapportionment, unless the number of registered voters within a district dropped to less than one-half of the quotient obtained by dividing the total number of registered voters by 51. This provision in the Constitution, together with the numerical number for the respective houses of the Legislature and the requirement of compactness and contiguity of districts all led to supplying that brake which is needed to keep partisan gerrymandering to a minimum at each decennial reapportionment.

3. The District Court was correct in refusing to invalidate that portion of the Hawaii Constitution requiring decennial reapportionment. Simply because Hawaii's decennial reapportionment happens to fall one year before the decennial United States census, does not mean that the reapportionment conducted in accordance with the Hawaii Constitution is invidious. In the first place, the decennial reapportionment falls one year prior to the decennial census because the Constitution was adopted in 1950, and the first reapportionment occurred in 1959. In the second place, since the reapportionment measure is the number of voters registered at the last preceding general election, the census count has no relevancy in the reapportionment of the House.

4. It cannot be said that the failure of the District Court to invalidate all portions of the Hawaii Constitution relat-

ing to the apportionment of both Houses of the Hawaii Legislature made the task of the State Legislature any more difficult in drafting the proposed Senate Reapportionment Plan, than it would have been had the District Court invalidated them. To argue so is to engage in conjecture. It would appear that if both houses required reapportionment, the task would have been doubly difficult.

VIII. The District Court correctly held that there is nothing invidious about measuring "population" on the number of registered voters at the last preceding general election in the apportionment of both the House and the Senate of the Hawaii Legislature.

A. The State may validly use the registered voter measure of population. The equal-populations principle is to enable each voter's vote to be given weight equal to the weight of the votes of all other voters. The Equal Protection Clause in state legislative apportionment cases protects the qualified voter; it does not guarantee "equal representation." While "equal representation" is the object of legislative apportionment, legislative apportionment alone cannot guarantee such equality.

B. 1. If total population is used as the basis for legislative apportionment, the weight of the votes of voters residing in districts with a greater number of nonvoters will tend to be more than the weight of the votes of the voters residing in districts with a lesser number of nonvoters. But, this is precisely what will happen if Hawaii uses the census total population figure in its legislative apportionment. In the census count, all military and their dependents and all tourists are counted. An effort is made to reallocate the tourists to their home state, but there is no

reliable count of how many are so reallocated. Military personnel are never reallocated to their home state although their legal and voting residences may be outside of Hawaii.

2. If total population is the measure upon which the Legislature must be apportioned, because of the large number of military and their dependents in Hawaii who are not qualified to vote, there would be districts on the island of Oahu consisting almost entirely of the military, with very few registered voters. Their votes, of course, will then weigh much more than the votes of other voters in other districts. There is indeed the distinct possibility that there may be districts in which there may be no voters at all.

C. The number of registered voters in Hawaii is in direct proportion to the number of civilians (excluding military) residing in Hawaii. This held true even when the Constitutional Convention of Hawaii was in session in 1950. Thus, even if the measure of population is the number of registered voters, the allocation of the number of seats in the Hawaii Legislature will be substantially the same as the allocation based on "total population."

D. The use of the number of registered voters in measuring "population" does not discriminate again certain segments of the State's population as Appellant in Case No. 318 contends. The figure showing the percentage of registered voters on Oahu is misleading, since it includes a large number of military concentrated on Oahu. The figures showing the percentage of the poor, illiterate and low median population age registered to vote are also misleading. With respect to the military, the qualification of those in the armed forces to participate in Hawaii's electoral process is not before this Court.

IX. The use of the multi-member districting system for the House of Representatives does not violate the Equal Protection Clause.

A. As in the case of the proposed Senate Reapportionment Plan, the use of multi-member districting system for the House of Representatives was influenced by determinations of policy and judgment decisions made by the Delegates to the Hawaii Constitutional Convention in 1950.

B. The use of multi-member districts for the House of Representatives has not been demonstrated to result in any invidious discrimination. The contentions of Appellant in Case No. 318 in these respects are purely speculative and the alleged results can occur as easily in single-member districts as in multi-member districts.

1. The representative district lines are based on established historical, geographical and natural lines, the districts adhere to the principles of compactness and contiguity, and there is proportionately equal populations in the districts. On its face, then, the districting of the House of Representatives cannot be said to be invidious or that there is lack of equal weight in the votes of all voters.

2. The alleged results of overrepresentation of the larger multi-member districts, submergence of the minority in multi-member districts and denigration of majority rule are all speculative. No proof was offered in the District Court to prove any of these allegations. Overrepresentation of certain segments of the population, submergence of minorities and denigration of majority rule can occur in single-member districts as well as in multi-member districts. The allegations of Appellant further suffer from the lack of specificity as to what majority is advantaged and what minority is submerged in the multi-member districts

ARGUMENT

The appellants in Case No. 409 contend that the District Court erred in rejecting the Senate Reapportionment Plan and in imposing its injunctive remedy. At the same time, however, the appellants believe that the District Court was correct in a number of its other holdings.

Since this brief is intended not only as the opening brief of the appellants in No. 409, but also as an answering brief to the brief filed by Appellant in Case No. 318, reference will be made from time to time to the brief of Appellant in Case No. 318. Where applicable, such references, for brevity, will be designated "GO Br." followed by pagination.

The order in which the arguments are presented is first, the errors of the District Court, and, second, the correctness of certain rulings of the District Court. In discussing the errors of the District Court, the arguments are intended, of course, not only to support the position of these appellants, but also to answer the arguments raised in the brief of Appellant in Case No. 318. The arguments upholding certain rulings of the Distrct Court are, of course, intended primarily as an answer to the brief of Appellant in Case No. 318.

I. THE DISTRICT COURT ERRED IN PLACING THE BURDEN UPON THE LEGISLATORS TO SHOW THAT THEIR SENATE REAPPORTIONMENT PLAN WAS CONSTITUTIONALLY VALID AND JUSTIFIABLE.

The District Court, by its decision and order of February 17, 1965, and again by the Memorandum of Judge Beeks to Judge Pence, placed an affirmative burden upon the Legislature to justify any creation of multi-member senatorial districts. (R. 79, 238 F. Supp. 468, 478; Appen-

dix B, pp. 20a to 21a, *infra*) The tenor of the District Court's decision and order dated April 28, 1965, is that the Legislature had the burden of showing that its senate reapportionment plan did not operate to minimize or cancel out the voting strength of any political, racial, social or economic element of the voting population, and that the plan was otherwise constitutionally valid and justifiable.

The District Court further concluded, without affirmative proof of any kind being submitted by any party, that the multi-member senatorial district plan resulted, in a material part at least, from gerrymandering. (R. 163, 240 F. Supp. 724, 732) From the finding of the court, it appears that the burden was upon the Legislature to show affirmatively that the multi-member district senatorial reapportionment plan did not result from gerrymandering.

Where a state legislature or other body politic frames a reapportionment plan, the burden is not on the framers to justify the plan; rather, the burden is upon the opponents of the plan to show that the plan minimizes or cancels out the voting strength of racial or political elements of the voting population, that the plan is the result of gerrymandering or that it is otherwise constitutionally defective and invalid. This is particularly true where, as in this case, the legislative apportionment plan complies substantially with the equal-populations principle enunciated by this Court in *Reynolds v. Sims*, 377 U.S. 533 (1964).

The Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States is used to test the validity of classifications, unequal treatments or discriminations. It is firmly established that not all classifications violate the Equal Protection Clause. In *Morey v.*

Doud, 354 U.S. 457, 464-65 (1957), this Court, quoting from prior cases, re-stated the rules for testing the validity of a classification:

"The rules for testing a discrimination have been summarized as follows:

" '1. The Equal Protection Clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary. Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78-79, 31 S.Ct. 337, 340, 55 L.Ed. 369.'

"To these rules we add the caution that 'Discrimination of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.' Louisville Gas & Electric Co. v. Coleman, 277 U.S. 32, 37-38, 48 S.Ct. 423, 425, 72 L.Ed. 770; Hartford Steam Boiler Inspection & Insurance Co. v. Harrison, 301 U.S. 459, 462, 57 S.Ct. 838, 840, 81 L.Ed. 1223."

The cases which have come before this Court under the Equal Protection Clause have generally fallen into one of two categories. (1) The first group of cases have been those in which the discrimination or classification was based on race or sex, in which instance, this Court held that the classification, *whether rational or not*, was simply impermissible under the Equal Protection Clause. *Gomillion v. Lightfoot*, 364 U.S. 339 (1960). (2) The second group of cases have been those in which the unequal treatment or discrimination or classification was not on any impermissible basis, but was shown to be invidious or without rational basis by the person attacking the classification. *Allied Stores, Inc. v. Bowers*, 358 U.S. 522 (1959); *Morey v. Doud*, 354 U.S. 457 (1957).

In state legislative apportionment cases, the tests to determine whether or not any apportionment plan violates the Equal Protection Clause have been said to be "well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular fact they must, that a discrimination reflects *no* policy, but simply arbitrary and capricious action." *Baker v. Carr*, 369 U.S. 186, 226 (1962). In *Reynolds v. Sims*, 377 U.S. 533 (1964), this Court held that apportionment of the seats in either house of the State legislature among legislative districts of "unequal populations" dilutes the weight of the vote of voters of larger population districts and thus violates the Equal Protection Clause. Apportionment among districts of "unequal populations" violates the Equal Protection Clause not necessarily because it is irrational or involves something other than a "republican form of government," but simply because it is "impermissible under the Equal Protection Clause." 377 U.S., at 575.

Thus, a State legislative apportionment plan which *on its face* appears to discriminate on the basis of race or sex or to apportion seats in either house of the State legislature among districts of "unequal populations" falls within the first group of cases enumerated above, and there is no presumption of validity and the rules re-stated in *Morey v. Doud*, 354 U.S. 457 (1957), do not apply.

It is submitted, however, that once it is clear, as it is in this Hawaii Legislative Apportionment Case,[2] that both houses of the State Legislature are apportioned in substantial compliance with the equal-populations principle, the general rules apply. The apportionment scheme is presumed constitutional and the burden is on the party attacking it, to show that it causes invidious discrimination or that it is the result of arbitrary or capricious action or that it contains basic inequities, no matter what factors were assumed to have been applied. *Lisco v. McNichols*, 208 F. Supp. 471, 477 (1962).[3] If any state of facts can reasonably be conceived to justify it, the existence of these state of facts will be presumed to have existed at the time it was drawn and it will not be set aside. *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78-79; *Morey v. Doud*, 354 U.S. 457, 464-65 (1957); *McGowen v. Maryland*, 366 U.S. 420, 426 (1961).

Placing the burden on the one attacking the apportionment plan is a reasonable one. "Apportionment is one of

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[2]The District Court noted that both the House and the proposed Senate apportionments conform to the equal-populations principle. (R. 79; R. 155)

[3]See also Israel, *Non-population Factors Relevant to an Acceptable Standard of Apportionment*, 38 NOTRE DAME LAW. 499 504, especially note 31 (1963).

those fields where it is easier to identify unfair or unequal methods than to articulate a *fair* method." [4]

Oddly enough, the District Court seemingly agreed that the burden should be on the party attacking the legislative apportionment scheme when it noted in its February decision:

> "3. The plaintiffs and intervening plaintiffs *have failed to prove* that the apportionment of the House of Representatives of the Legislature of the State of Hawaii causes any invidious discrimination in the weight of their vote or that such apportionment is the result of arbitrary or capricious action. Their prayers for relief in this respect are therefore denied." (R. 79-80, 238 F. Supp. 468) (Emphasis added.)

Yet the District Court, inconsistently it appears, required the Legislature to justify the Senate Reapportionment Plan.

In *Fortson v. Dorsey*, 379 U.S. 433 (1965), this Court, held that it could not say that the multi-member districting plan for the Georgia Senate was *per se* bad, inasmuch as there was no "mathematical disparity" in the population count between the single-member districts and the multi-member counties. This Court refused to pass on the question whether or not Georgia's reapportionment plan for the Senate "operated to minimize or cancel out the voting strength of racial or political elements of the voting population," although the appellees raised this objection in their briefs, because the point was never seriously pressed by the appellees in the court below and no proof to support the objection was offered at the district court level.

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[4] Dixon, *Apportionment Standards and Judicial Power*, 38 NOTRE DAME LAW. 367, 370 (1963).

Similarly, in this Hawaii case, the charge of gerrymandering, if any, and the charge that the House apportionment or the Senate reapportionment plan operated to minimize or cancel out the voting strength of political, racial, social or economic elements of the voting population should have been pressed and proof offered in support thereof by the opponents of the Hawaii House apportionment and the Hawaii Senate reapportionment plan. It will be shown in this brief that no such evidence was ~~even~~ ever submitted. On the contrary, this brief will show that if any is required, abundant evidence is in the record for the House apportionment and the proposed Senate reapportionment to pass the tests of the Equal Protection Clause.

II. THE DISTRICT COURT ABUSED ITS DISCRETION IN JUDICIALLY ATTEMPTING TO STRUCTURE THE VARIOUS FACTORS INVOLVED IN THE DEVELOPMENT OF FAIR AND EFFECTIVE REPRESENTATION FOR EACH VOTER IN THE HAWAII LEGISLATURE.

The Senate Reapportionment Plan presented to the District Court on April 14, 1965, created eight senatorial districts with substantially equal population per senator. The District Court conceded that "the number of registered voters per senatorial district and apportioned to the four basic areas . . . conforms to the standards required under the method of equal proportions prescribed by the Constitution of the State of Hawaii and thus meets that one test of constitutionality." (R. 155; 240 F. Supp., at 727.) The District Court, nevertheless, held the reapportionment plan unconstitutional. It held that the following features made the plan unacceptable: (1) the plan contained multi-member districts; (2) the respective senatorial districts were "highly" heterogeneous in their ethnic, socio-economic, industrial and occupational complexion; (3) the boundaries of some senatorial districts were identical to or co-

incided to a great degree with the boundaries of certain representative districts. The District Court sought judicially to structure these factors and to curtail the exercise of political judgment by establishing rigid standards that the senatorial districts *must* be based on single-member districts, that the senatorial districts *must* be homogeneous in their ethnic, political, socio-economic, occupational and industrial complexion and each such homogeneous district *must* have potentially equal representation in the Hawaii Legislature, and that *no* senatorial district boundaries may be identical to or coincide with the boundaries of any representative district.

Each of the District Court's objections is discussed at length in the subsequent portions of this brief. This part of the brief is intended merely to point out that legislative apportionment presents many complex problems, the determination of which involves to a high degree, the formulation of public policies and the exercise of judgment. Public policy decisions and judgment determinations will chart the course of apportionment. Within the constitutional limitations proscribing certain bases of discrimination, there is room for the body politic to make these policy decisions and judgment determinations.

A. The legislature is but one facet of government which requires proper structuring in achieving fair and effective representation for all citizens and the structuring of each facet to achieve this basic aim depends on the structure of many relevant factors.

As stated by this Court,

> "[T]he achieving of fair and effective representation for all citizens is concededly the basic aim of legislative apportionment." *Reynolds v. Sims*, 377 U.S. 533, 565-66 (1964).

This Court held in the *Reynolds* case that to achieve this aim, the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States requires that the weight of the vote of a citizen be substantially equal to the weight of the vote of every other citizen, and that to insure this "weight-equality," both houses of a bicameral state legislature must be apportioned on a population basis—that is, the state legislature must be so apportioned that the legislative districts in both houses are "as nearly of equal population as is practicable." 377 U.S. 533, at 577.

The Legislature, however, is but one of many facets of government. Proper apportionment of the legislature alone does not insure fair and equal representation. Professor Robert G. Dixon, Jr., makes these comments:[5]

> "In short, a one man-one vote principle guarantees change; taken alone, it may not always guarantee fair representation, which should be the ultimate goal."[6]

> "Judicial creation of equal population districts, without more, cannot be counted on to produce either 'equally weighted' votes or 'equally effective' votes."[7]

In addition to proper legislative apportionment, the achieving of fair and effective representative government depends on the shape of the other two branches of government, voter registration and election procedures, legislative and administrative procedures, pressure groups and political parties. These facets are all inter-related; none

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[5]Dixon, *Reapportionment in the Supreme Court and Congress*, 63 MICH. L. REV. 209 (1964).

[6]*Id.* at 217.

[7]*Id.* at 219.

of them can be considered in isolation. How each is structured influences the structuring of the others, and each must be properly structured in relation to the others to achieve a fair and effective representative system.

Not only are the facets of government inter-related, but the shaping of each is influenced by the political community's theory of representative government, political and social philosophies and political, social and economic experience and development. In addition, the structuring of each facet and its component parts is often dictated by the existing state of facts or factors.

Legislative apportionment is the division of the populace into constituencies whose electors vote for members of an assembly.[8] How the districts should be aligned and how many of the legislators should be apportioned among the various districts entail consideration of existing geography, political subdivisions, nature of the electorate, frequency of apportionment, dispersion of various interest groups throughout the state, and the size and kind of legislature.

The lesson taught by *Reynolds v. Sims*, 377 U.S. 533 (1964), and its companion cases on state legislative apportionment, is that regardless of how the various facets of democratic government are structured and regardless of the facts considered by the body politic, to insure equal weight to the votes of all citizens, the state legislature must be apportioned among districts composed of substantially equal numbers of people. This Court did not prohibit the body politic from considering the effect of the existing structure of the various facets of government or from approaching the problem of apportionment in the light of the varient

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[8] De Grazia, Apportionment and Representative Government 18-19 (1963).

factors. This Court has been made aware of the complexity of legislative apportionment, *Reynolds v. Sims*, 377 U.S. 533, 566 (1964), and has recognized that the constitutionality of a state legislative apportionment plan may well depend on the circumstances of the state. Thus, this Court stated,

> "Somewhat more flexibility may therefore be constitutionally permissible with respect to state legislative apportionment than in congressional districting . . . What is marginally permissible in one State may be unsatisfactory in another depending on the particular circumstances of the case." *Reynolds v. Sims*, 377 U.S. 533, 578 (1964).

This Court has often recognized history and geography as factors to be considered in drawing district boundary lines. It has recognized too, that integrity of political subdivisions is a factor. This Court indicated that there may be, on a rational basis, some deviation from the equal-populations principle, provided, that the "overriding objective [is] . . . substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State." *Reynolds v. Sims*, 377 U.S. 533, 579 (1964).

B. The structuring and employment of the various factors in legislative apportionment require to a great degree the exercise of judgment better accomplished by the body politic rather than the judiciary.

Since *Luther v. Borden*, 7 How. 1, 12 L. Ed. 581, this Court has consistently refused to define what constitutes a "Republican Form of Government" within the meaning of the Guaranty Clause of Article IV, section 4 of the Constitution of the United States. While it may appear that this Court's enunciation of the equal-populations principle has

a direct bearing on the form of "representative government" a state may enjoy, this Court, in deciding *Reynolds v. Sims*, 377 U.S. 533 (1964), and the companion state legislative apportionment cases, decided no more than that the Fourteenth Amendment makes it impermissible for a state to discriminate against a person, by reason of his homesite, in the weight to be accorded to his vote. *Baker v. Carr*, 369 U.S. 186, 218-226 (1962). Within the constitutional limits prohibiting discrimination of a voter in the weight of his vote by reason of homesite, the body politic is better equipped to make the judgment decisions in the light of the varient factors and their structures and to make the policy decisions necessary in achieving fair and equal representation for all citizens in the state legislature.

That there is room for judgmental and policy decisions by the body politic is implicit in the holdings of this Court, thus:

> "States can within limits specify the qualifications of voters in both state and federal elections; . . .
>
> ". . . Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment." *Gray v. Sanders*, 372 U.S. 368, 379 (1963).
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> "Determining the size of its legislative bodies is of course a matter within the discretion of each individual State. Nothing in this opinion should be read as indicating that there are any federal constitutional maximums or minimums on the size of state legislative bodies." *Reynolds v. Sims*, 377 U.S. 533, 581, n. 63 (1964).

As indicated earlier, voter qualifications and the size of the state legislature are indeed factors influencing the shape of the state's legislative body.

Thus, as it will be more fully developed in the subsequent portions of this brief, whether the reapportionment plan for the Hawaii Legislature should be based on multi-member districts or on single-member districts, whether the senatorial districts should be homogeneous or heterogeneous in their ethnic, political, socio-economic, industrial and occupational complexion, and where the district boundary lines should be drawn were questions better left to the judgment and policy determinations of the Hawaii body politic, especially in the light of substantial adherence by the Hawaii Legislature to the equal-populations principle.

III. THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES DOES NOT REQUIRE THAT ONE HOUSE, AT LEAST, OF HAWAII'S BICAMERAL LEGISLATURE BE APPORTIONED ON THE BASIS OF SINGLE-MEMBER DISTRICTS.

A. The Equal Protection Clause does not per se require that one house at least of a State bicameral legislature be apportioned among single-member districts.

Pointing to its February decision (R. 62-81, 238 F. Supp. 468) the District Court held that since the Hawaii House of Representatives was apportioned on a multi-member districting system, the Senate reapportionment plan must provide for single-member senatorial districts, unless valid and compelling justifications could be shown for the creation of multi-member districts. For authority, it cited *Butcher v. Bloom*, 415 Pa. 438, 203 A.2d 556 (1964).

The appellant in Case No. 318 goes further than the District Court and not only contends that the House of Representatives, as well as the Senate, of the Hawaii Legislature

must be apportioned on single-member districting system, but boldly asserts that perhaps in *all* cases where both houses of any state legislature are apportioned on multi-member districting system, the apportionment is unconstitutional *per se.* (GO Br. 101-02) The argument of appellant in Case No. 318 leaves no room for single-member districts in any plan of apportionment in either house of a bicameral legislature—apparently, regardless of the justifications which a court might consider in upholding multi-member districts.

In *Butcher v. Bloom*, 415 Pa. 438, 203 A.2d 556 (1964), the court did not rule that at least one house of the Pennsylvania Legislature must be apportioned on the basis of single-member districts, nor did it require, as a matter of law, justifications for the creation of multi-member districts. The court in that case acknowledged that the creation of multi-member districts would not of itself violate the Federal Constitution merely because the voters of one district may vote for two or more representatives while the voters of another district may vote for a lesser number. The court simply recognized the difficulties which may be encountered in setting up multi-member districts, and cautioned that it might be *more prudent* to approach the matter of apportionment by setting up single-member districts. 203 A.2d, at 572-73.

None of the cases decided by this Court has ever *required* that at least one house (much less, both houses) of a bicameral State Legislature be apportioned on the basis of single-member districts nor has it required *justifications* for the creation of multi-member districts. This Court in *Reynolds v. Sims*, 377 U.S. 533 (1964), stated:

"Single-member districts may be the rule in one State, while another State might desire to achieve some flexi-

bility by creating multi-member or floterial districts." 377 U.S., 579

In *Lucas v. Forty-Fourth General Assembly of Colorado*, 377 U.S. 713 (1964) this Court discussed some of the practical problems in that system of election where a number of senators and representatives are elected on an at-large basis in a district. This Court, however, made it clear in note 21, 377 U.S., at 731, that it was not intimating that an at-large election of a number of legislators from a county or any political subdivision, was constitutionally defective.

Then, in *Fortson v. Dorsey*, 379, U.S. 433 (1965), this Court rejected the argument that the multi-member districting system for the Senate of the Georgia Legislature was constitutionally defective. It stated:

> "Only last Term, in our opinion in Reynolds v. Sims, 377 U.S. 533, 84 S. Ct. 1362, 12 L.Ed.2d 506, decided after the decision below, we rejected the notion that equal protection necessarily requires the formation of single-member districts." 379 U.S., at 436.

While it is true that in *Fortson v. Dorsey*, this Court had before it the multi-member districting system of only the Senate of the Georgia Legislature, this Court did not expressly limit its holding to only one house of a bicameral legislature. In *Lucas v. Forty-Fourth General Assembly of Colorado*, 377 U.S. 713 (1964), this Court's observation respecting at-large elections of several legislators from a county or a political subdivision was directed to the existing Colorado's scheme of apportionment which required at-large elections of a number of legislators of both houses from a county.

Thus, the apportionment of both houses of the Hawaii Legislature on multi-member districting system does not

per se violate the Equal Protection Clause of the Fourteenth Amendment. The remainder of this part of the brief is focused on the question whether *on the basis of the facts of this case*, the multi-member districting system in the Hawaii Senate Reapportionment Plan dilutes the weight of a voter or otherwise discriminates against a voter in violation of the Equal Protection Clause.[9] If, as the District Court held, justifications are needed for the creation of multi-member districts for the Hawaii Senate, the following discussions will more than amply provide such justifications.

B. Multi-member districts in the Senate Reapportionment Plan were fashioned upon policy considerations and relevant factors and thus cannot be said to be arbitrary, irrational or as reflecting no policy.

The choice of using single-member districts or multi-member districts in the apportionment of the State Legislature is influenced by judgmental decisions arising from the consideration of numerous factors and policy determinations based on the needs of the community in the light of its political, social and economic experience and development. The Hawaii Legislature, in fashioning the Senate Reapportionment Plan on multi-member districts, made these judgmental decisions and policy determinations. It was influenced by the relative needs of the State and the structure of existing factors in arriving at its decision to create multi-member senatorial districts.

1. *The selection of single-member or multi-member districting system is rooted in public policy considerations.*

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[9]While the ensuing discussion is covered primarily in terms of the proposed Hawaii Senate Reapportionment Plan, it is equally applicable to the present apportionment of the Hawaii House of Representatives. (See pp. 109 to 116, *infra*.)

Multi-member districts are just as much in the American tradition as single-member districts. For nearly two centuries the various States experimented with both the single-member districts and the multi-member districts.[10] This issue of single-member districts versus multi-member districts has been debated for years in the various states. Oddly enough, the arguments posed by the proponents of single-member districts and the proponents of multi-member districts stem from the same premises. These premises are cited by both sides to support or justify their respective positions. Thus, they both state:

a. There is less diversity of interests within single-member districts, and more diversity of interests within multi-member districts.

b. Elections in single-member districts concentrate on the candidates; elections in multi-member districts concentrate on the broad issues rather than on candidates.

c. As a matter of survival at the polls, the legislator chosen from a single-member district is apt to be more responsive to his constituents and to pay closer attention to local needs; the legislator chosen from multi-member district is oriented toward state-wide problems rather than purely local issues.

d. Since a legislator chosen from a single-member district is more responsive to his constituents, he is less

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[10]Silva, *Compared Values of the Single and the Multi-Member Legislative District,* 17 THE WESTERN POLITICAL QUARTERLY 504 (1964). In this treatise, Professor Silva traces the evolution of the single-member districting system in the United States and discusses the arguments traditionally advanced by the proponents of the single-member districts and the proponents of the multi-member districts.

dependent on his political party; a legislator chosen from a multi-member district fosters the development of responsible political parties.

e. Legislators from single-member districts, with less party pressure upon him will be more amenable to the needs of various interest groups; legislators from multi-member districts will be more responsible to his political party and less amenable to pressure groups.

While the truth of these basic premises has never really been established, (mainly due to the lack of statistical studies)[11] the fact that both the proponents of the single-member districts and the proponents of the multi-member districts thus agree reduces the basic premises to these questions of policy, the determination of which will influence whether the single-member districting system or the multi-member districting system is to be used within a state. (1) Should the election of state legislators be centered on issues rather than candidates and personalities? (2) Should the legislators be local-issue oriented, or state-wide issue oriented? (3) Should development of political parties and political party responsibility be fostered? (4) Should legislators be subservient to pressure groups or should they be insulated as much as possible from the pressures of interest groups? The answers to these questions of policy depend on the political philosophy, experience and development of the political community. And, these are precisely the questions to which the Hawaii Legislature addressed itself in fashioning multi-member districts for the Hawaii Senate.

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[11]Silva, *Compared Values of the Single and the Multi-Member Legislative District*, 17 THE WESTERN POLITICAL QUARTERLY 504, 508, 509 (1964)

Of course, the proponents of the single-member districting system and the proponents of the multi-member districting system disagree on exactly what effect either system has on the concept of "representative government". Thus, as the Appellant in Case No. 318 contends, the proponents of the single-member districting system claim that multi-member districting system overrepresents the large multi-member districts, submerges the rights of minorities, facilitates gerrymandering and denigrates the principle of majority rule. Each of the Appellant's contentions is dealt with in the subsequent portions of this brief. Suffice it here to point out that these contentions are speculative at best, and in the Hawaii apportionment case, for both the House and the Senate, the contentions are without factual foundation.

2. *Multi-member districting system for the Hawaii Senate was based on policy considerations.*

The District Court noted in its April decision that the Legislature, in creating multi-member senatorial districts under the Senate reapportionment plan, failed to consider or use any other criteria, "save number of registered voters, geographical boundaries and historial representative district lines." (R. 156, 240 F.Supp., at 727-28) This charge is repeated in the brief of Appellant in Case No. 318. Contrary to this finding, the Conference Committee reports attached to the plan submitted to the District Court (R. 119, 130) and the testimony of Senator Sakae Takahashi (R. 293-316) reveal that the Hawaii Legislature chose multi-member senatorial districts after wrestling with serious policy questions.

One of these questions was whether or not the make-up of the Hawaii Senate should reflect concern for state-wide problems rather than local problems. Although cognizant of the argument that "small, single-member districts may

offer an advantage by providing a close relationship between voter and legislator and that it may provide a chance for the voters to become better informed, based on this close relationship," (R. 123, 134) the Legislature, in the light of the rapid, economic development of the State as a whole, concluded that the best interests of Hawaii would be served by a legislature oriented toward statewide problems rather than purely local issues. (R. 297-98) The reports of the Conference Committee of the Legislature contained these observations: (1) single-member districts would tend to cause senators to be concerned primarily with localized issues and ignore the broader issues facing the State, thus fragmenting the approach to state-wide problems and programs, including economic development and capital improvements programs, to the detriment of the State as a whole (R. 123, 134); (2) multi-member districts will provide a better opportunity for increasing the significance of an individual's vote by focusing the individual's attention on a broad spectrum of major community problems as opposed to those of more limited and local concerns (R. 124, 135).

As the District Court pointed out in its February decision, the government of Hawaii is strongly centralized. (R. 64, 238 F. Supp., at 470-71) The State has complete control over the judiciary, taxation, education, and public health and welfare, among other areas of government concern. This highly State-centered form of government and Hawaii's developing and expanding economy, the dispersion of voters into new suburban communities, the growing demand for the fulfillment of social needs of the people give substantial merit to the policy decision of the Hawaii Legislature. Single-member senatorial districting system, with each senatorial district having a voter population of ap-

proximately 9,500[12] would tend to foster the growth of small community political machines and the election of legislators with narrow, local viewpoint, when the social, economic and political demands of the people of Hawaii are largely of state-wide concern.

The Legislature in creating multi-member districts for the Hawaii Senate was concerned, too, with the development of a strong two-party system for the State. Thus, even in rejecting single-member senatorial districts, the Legislature expressed concern that if the districts were made too large, Hawaii's two party system would be weakened. (R. 124, 135) The concern of the Legislature for a strong two party system was indeed in keeping with its policy decision to foster the election of legislators with broad, state-wide perspective. A strong party system demands the loyalty of the legislator to his party's stand on major issues facing the State, rather than to the demands of different interests which harbor narrow perspectives.

Indeed, by the very nature of the political process, determination of such public policy is better accomplished by the Legislature than the judiciary. The choice between single-member districts and multi-member districts for the Hawaii Senate was properly dictated by legislative determination of such policy. Thus, the Legislature's election to pursue multi-member districting system for the Hawaii Senate cannot be said to be unreasonable, arbitrary or that it reflects no policy.

3. *The selection of multi-member districts for the Hawaii Senate was influenced by the shape of other existing factors.*

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[12]Based on the 1964 registered voters count. (R 55)

In addition to the policy determination that it is in the best interests of the State to foster the election of legislators who are oriented toward state-wide problems rather than toward local issues, the structure of the following factors influenced greatly the decision of the Legislature to create multi-member districts for the Senate: (a) numerical size of the legislature; (b) size of the senatorial districts; (c) frequency of reapportionment; (d) population shifts; (e) relationship between representative districts and senatorial districts.

The Hawaii Constitution provides for a 25-member Senate and a 51-member House. In drawing the Senate Reapportionment Plan, one of the grave concerns of the Legislature was the creation of districts containing population too small or too large in number. (R 123-25, 134-36) The creation of single-member districts for the Senate would mean that each senatorial district would have a registered voter population of approximately 9,500, based on the 1964 registered voter enumeration. (R. 55) It would mean, further, that the island of Oahu, which has the bulk of the State's population would be divided into 19 senatorial districts. Single-member senatorial districts containing 9,500 registered voter population would be too small—too small for a number of reasons.

(a) Single-member senatorial districts would subvert the legislative policy of fostering the election of legislators with broad view (R. 123, 134, 297).

(b) Small, single-member districts would compound the technical and intricate problem of drawing the boundaries of the districts, and could lead to indiscriminate districting without regard for political subdivision, or geographic, natural or historical boundary lines, which this Court noted

in *Reynolds v. Sims*, 377 U.S. 533, 578-79 (1964), "may be little more than an open invitation to partisan gerrymandering." (R. 124, 135)

(c) Small, single-member districts would be highly susceptible to the vicissitudes of population shifts. The Conference Committee of the Hawaii Legislature in its reports observed:

> "This means that if small, single-member districts are employed, more frequent reapportionments and readjustments of district boundaries would be required. This concern is particularly significant on Oahu which has experienced a population boom and the massive and rapid development of residential subdivisions to accommodate the increased and mobile population." (R. 125, 135)

To Robert Schmitt, an expert witness, the proposed districting of the senate provided the optimum to prevent disparity in population among the various senatorial districts during a ten-year apportionment period. (R. 328) In his judgment, single-member districts, particularly on Oahu, would be seriously affected by fluctuations in population during the ten-year period. He noted that the population of some of the single member senatorial districts would decline as much as 33.6 per cent and others would increase as much as 141.7 per cent. On the other hand, the proposed senatorial multi-member districts would have a population change of only 4 per cent. (R. 320) He said,

> "The same thing is true in the trend of registered voters. It has a small area with a large number of small districts which would be subject to considerable fluctuation in a short period of time in the number of registered voters; whereas a small number of large districts or pockets, pocket districts, would be subject to much less

fluctuation in the number of registered voters, that is, proportionately. This is over a period of a decade, a large number of small districts would tend to move in very divergent directions; whereas in a few large districts, areas of growth within any district would tend to balance out areas, and vice versa." (R. 318)

(d) Traditionally senatorial districts have been larger than representative districts. To compensate for the extra territory which must be covered by a senatorial candidate at elections and represented by a successful candidate, the term of office for the Senate was set at four years and for the House of Representatives at two. (R. 123, 134) Single-member senatorial districts would mean that in many instances, particularly on the island of Oahu where the State's population is concentrated, senatorial districts would be smaller than representative districts. This would subvert not only tradition, but the intent of the framers of the Hawaii Constitution. (R. 123-24, 134-35) At the time of the drafting of the Senate Reapportionment Plan, the Legislature was aware of the District Court's February decision (R. 62-81, 238 F. Supp. 468) that the make-up of the Hawaii House of Representatives, with its multi-member districts, was constitutionally valid.[13] While the February decision of the District Court by itself is not controlling in determining the validity of the Senate Reapportionment Plan, that decision, taken in conjunction with the policy questions faced by the Hawaii Legislature and the other factors enumerated above, provided a reasonable basis and valid justification for the creation of multi-member senatorial districts.

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[13]It is the position of the appellants in No. 409 that the House of Representatives is constitutionally apportioned (see pp. 85 to 89, *infra*) and that the multi-member districting system of the House of Representatives is constitutionally acceptable (see pp. 109 to 116, *infra*).

While the Hawaii Legislature wished to avoid creating senatorial districts containing voter populations too small in number, it equally wished to avoid creating senatorial districts containing voter populations too large in number. In its reports, the Conference Committee noted that "if the multi-member district has too large a number of senators or too large a number of vacancies to be filled in the same election, then intelligent voter selection may become quite difficult and the two party system may be weakened." (R. 124, 135)

Having rejected single-member districts, and wishing equally to avoid creating districts containing voter populations too large in number, the Hawaii Legislature gave serious thought to two-member and three-member districts for the island of Oahu. Two-member districts were still too small in the judgment of the Legislature. Three-member districts meant the division of the island of Oahu into seven senatorial districts, with many of the seven districts approaching closely the population and geographical sizes of the ten existing representative districts, leading to the dissipation of one of the real basis for bicameralism in Hawaii. (R. 127-28, 138) Five-member districts, on the other hand, would create for the island of Oahu, districts too large in size. (R. 298-99)

Upon consideration of all of the foregoing factors, the Hawaii Legislature concluded that the Senate Reapportionment Plan should provide for multi-member districts, ranging from one senator per district to four senators per district. The creation of multi-member senatorial districts upon such careful consideration of the varient factors cannot be said, by itself, to be arbitrary or lacking in rational policy.

The Appellant in Case No. 318 contends that one of the ills of the Senate Reapportionment Plan is traceable to the membership figure of 25 set by the Hawaii Constitution for the Hawaii Senate and to the assumption by the Hawaii Legislature that the Senate must be apportioned on the basis of this membership figure. He suggests that the Legislature ought to have considered reducing the number of Senators to something less than 25 in order that the Senate may be apportioned on the basis of single-member districts without making senatorial districts smaller than representative districts. (GO Br. 36-37, 39-40, 98) Appellant suggests no figure. The Proceedings of the Hawaii Constitutional Convention reflect that much thought went into the selection of a 25-member Senate and a 51-member House. The Senate membership of 15 and the House membership of 25 which existed for the Hawaii Territorial Legislature were, to the members of the Constitutional Convention, too small in the light of the increase in population since the adoption of the Organic Act and the desirability for wider representation of the population. (R. 343, 346, 348) The District Court found that there was "no built-in magic or invidiousness in the use of such numbers [25 for the Senate and 51 for the House]," and rejected the claim of plaintiffs that the number of legislators in each house was a part of some invidious scheme. (R. 66, note 4; 238 F. Supp., at 472, note 4)

The size of the legislature is a problem for judgmental decision, properly left to the political body of government. This Court in *Reynolds v. Sims*, 377 U.S. 533 (1964), said as much:

> "Determing the size of its legislative bodies is of course a matter within the discretion of each individual State. Nothing in this opinion should be read as indi-

cating that there are any federal constitutional maximums or minimums on the size of state legislative bodies." 377 U.S., at 581, note 63.

The Hawaii Legislature accepted the 25-member composition of the Senate as its starting point. This acceptance was in itself a judgmental decision. Starting with this structure of the Senate numerical composition, the Hawaii Legislature proceeded to consider policy and other state of facts as indicated above.

The Appellant in Case No. 318 contends further that another of the ills of the Senate Reapportionment Plan stemmed from the assumption by the Legislature that the multi-member districting system for the House was constitutionally valid and from the notion that senatorial districts were traditionally larger than representative districts. Appellant attempted to show in his brief that the multi-member districting system in the House was unconstitutional, despite the District Court's findings of its constitutionality (R. 79-80; 238 F. Supp., at 478-79). He concluded that because the Senate reapportionment depended so much on the invalid House make-up, the Senate Reapportionment Plan was itself invalid. Short answers to this are (1) that the District Court was correct in holding that the multi-member districting of the House was constitutionally valid (See pp. 109 to 116, *infra*), and (2) although in some instances invalidity of one house may invalidate the other in a bicameral legislature, this was not the case in the Hawaii Legislative apportionment. (See pp. 85 to 89, *infra*).

C. The Proposed Senatorial District Boundaries are not arbitrarily drawn, nor are they without rational basis.

Appellant in Case No. 318 contends in his brief that the boundary lines of both the representative districts and the

senatorial districts are drawn arbitrarily, with no rhyme or reason, and thus the multi-member districting systems of both houses of the Hawaii Legislature violate the Equal Protection Clause of the Fourteenth Amendment. (GO Br. 73-76, 99). The difficulty in following this line of reasoning is that in the first place, the validity of multi-member districting system does not depend on the arbitrariness or logic of legislative district boundary lines. The validity of multi-member districts depends simply on the answer to the question whether or not there has been any substantial dilution in the weight of the vote of a voter.

In the second place, the fact that legislative district boundary lines are arbitrary does not of itself violate the Equal Protection Clause.[14] It is well to remember that the Equal Protection Clause does not guarantee equal treatment for all; it precludes the unequal treatment or discrimination or differences in classification" which lacks rational basis or which rests on grounds "wholly irrelevant to the achievement of the State's objective." *McGowen v. Maryland*, 366 U.S. 420, 425-26 (1961); *Morey v. Doud*, 354 U.S. 457, 463-64 (1957).

As noted earlier (pp. 23 to 24, *supra*), under the Equal Protection Clause, the apportionment of a state legislature

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[14]In *Reynolds v. Sims*, 377 U.S. 533 (1964), this Court commenting on the Alabama's existing apportionment provisions stated, "Furthermore, the existing apportionment, and also to a lesser extent the apportionment under the Crawford-Webb Act, presented little more than crazy quilts, completely lacking in rationality, and could be found invalid on that basis alone." 377 U.S., at 568. But this dictum of the Court was clearly applicable in the case of Alabama, where the existing provisions and the proposed apportionment plan both deviated grossly from the equal-populations principle. Such is not the case with respect to the Hawaii Legislature and the proposed Senate Reapportionment Plan.

based on race or sex or which *on its face* shows disparity in population among the legislative district is simply impermissible, *whether rational or not.*

In this Hawaii Legislative apportionment case, the starting point is that neither the proposed reapportionment of the Senate nor the apportionment of the House of Representatives is on any constitutionally impermissible basis. There is no discrimination alleged on account of race or sex. Both the house districts and the proposed senatorial districts comply substantially with the equal-populations principle. Thus, this case is not one of those which are, whether rational or not, simply impermissible. Therefore, to be violative of the Equal Protection Clause, it must be shown that the apportionment contains discrimination which is invidious or without rational basis. The questions then are: (1) Are the voters in one district treated differently from the voters in the other districts? (2) If so, what evidence is there to show that the unequal treatment is without rational basis?

Appellant in Case No. 318 admits that there is equality of voting strength in the sense of the number of registered voters per legislator, but complains that there "clearly is no equality of representation." (GO Br. 79) Aside from failing to define what is "equal representation" (which was shown earlier to be a complex question requiring consideration of political theories and varient factors), the Apellant in Case No. 318 is apparently complaining of the results which he believes will stem from the multi-member districting system—*i.e.*, over-representation of the large multi-member districts, submergence of minority interests, and denigration of the principle of majority rule. It will be shown in a latter part of this brief, that this belief is

without supporting evidence, that it is speculative at best and that it can easily result even in the single-member districting system.

1. *Even if it be assumed that there is some unequal treatment of voters of some districts, it cannot be said that the proposed senatorial districts were aligned arbitrarily or without rationality. The proposed senatorial district boundaries follow closely geographic, historical and natural lines and adhere to the principles of compactness and contiguity.*

There is nothing in the District Court's April decision (R. 62-81, 238 F. Supp. 468) which even remotely suggests that the senatorial district boundary lines are in and of themselves arbitrary. Rather, the District Court found that the senatorial district boundaries follow natural, geographical boundaries and historical and statistical lines (R. 156, 157), and that the districts are compact and contiguous (R. 161). The District Court was concerned not with the geographic placement of the boundary lines, but with what became encompassed within the districts. Thus, the District Court's April opinion deals primarily with the size of the districts and the various characteristics of the populace within the districts and expresses concern over the lack of homogeneity within the districts of ethnic, social, political, industrial, economic, occupational, and community groups and interests. (R. 156, 161, 240 F. Supp., at 728)

The Hawaii Legislature's placement of the senatorial district lines was influenced by a number of factors, and the lines followed a consistent pattern. From the outset, the Legislature was gravely aware of the admonition of this Court set forth in *Reynolds v. Sims*, 377 U.S. 533, 578-79 (1964): "Indiscriminate districting, without any regard for political subdivision or natural or historical boundary lines may be little more than an open invitation to partisan

gerrymandering." (R. 124, 135) In setting senatorial district lines, the Legislature followed existing geopraphical lines and density of population (R. 125, 136); "relied very heavily" on the standards of compactness and contiguity (R. 125, 136); and took into account areas of population concentration and established and recognized communities (R. 127, 137). In the words of the expert, Robert Schmitt, "On the basis of substantial equality of the number of registered voters, on the use of long standing statistical and taxation and land division boundaries, on contiguity and compactness, the districts seemed to be well thought out." (R. 317) Robert Schmitt was visibly impressed with the selection of long standing statistical boundary lines:

> "I was very impressed as a statistician to see many of the boundaries chosen by the Conference Committee are of a long-standing statistical boundaries. Now, statistical boundaries are not in themselves as meaningful as economic boundaries. But it so happens that in Hawaii, where we have excellent statistical boundaries that have endured for many years—for example, the windward side consisting of Koolauloa and Koolaupoko judicial districts has formed a unit since earliest antiquity." (R. 321)

It is true, that some of the senatorial district boundaries followed taxation district lines, while others followed geographical lines, and still others political boundary lines (counties). Yet, the end result of the drawing of senatorial district lines was that there was considerable amount of "logic and meaningfulness." (R. 325) In the light of the foregoing, can it be said that the lines are arbitrary and without rationality? Is it really required, as the Appellant in Case No. 318 contends, that the Legislature follow only

one pattern of lines, *i.e.*, census tract lines, to the exclusion of all other natural, historical, political subdivision, and statistical line?[15]

This Court has repeatedly recognized that history and geography are factors to be considered in drawing district boundaries. It held that integrity of political subdivisions is a factor and that there may be, on a rational basis, *some* deviation from the equal-populations principle. *Reynolds v. Sims*, 377 U.S. 533, 579 (1964). The following of established historical, natural, political subdivision and statistical lines, the compactness and contiguity of the districts, and the respect for existing communities all attest to the reasonableness and rationality of the senatorial district lines.

2. *The fact that one proposed senatorial district and a representative district have the same geographical boundaries and that another proposed senatorial district and a representative district have nearly identical boundaries does not render the senate districting plan arbitrary or irrational.*

As districted, on the island of Oahu, the proposed Third Senatorial District and the Eight Representative Dstrict have the same boundary lines. In addition, the proposed Sixth Senatorial District boundary lines are almost, but not quite, the same as the Fifteenth Representative District boundary lines. With respect to the proposed Third Senatorial District and the Eighth Representative District, the Koolau Range provides a natural and histori-

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[15]See brief of Appellant in Case No. 318, page 74. The decision not to follow census tract line stemmed from the decision of the Delegates to the Hawaii Constitutional Convention to use "registered voters" as the measure of population in apportioning the House of Representatives. (R. 347-48) (See discussion of "registered voters" as the proper measure of population on pp. 95 to 109, *infra*.)

cal and a well-defined geographic and political line (R. 126, 321). Further, the alignment of the Third Senatorial District along the boundaries of the Eighth Representative District resulted only after careful consideration of relevant factors. In its deliberation in the districting of the island of Oahu, the Legislature found that one or two-member senatorial districts were too small, for the reasons already noted. (See pp. 40 to 44, *supra*.) Three-member districts would have made the boundaries of nearly all of the resulting seven Oahu senatorial districts the same as the boundaries of the ten existing Oahu representative districts. Five-member districts, on the other hand, would have meant districts too large in size. Thus, the Legislature concluded that a maximum of four members to a district would be in the best interest of the State. This meant that only one senatorial district would have the same boundaries as a representative district—the Third Senatorial District with the Eighth Representative District. (R. 299)

With respect to the Sixth Senatorial District, the break-up of the Fourteenth Representative District into two parts, one part joining the proposed Fifth Senatorial District, and the other part uniting with the proposed Sixth Senatorial District was based on natural, geographic division resulting in substantially equal population between the proposed Fifth and the proposed Sixth Senatorial Districts. (R. 301-02) Further, the division line neatly separates the Kakaako from the central business district and provides a clear distinction between areas of different social, housing, and economic characteristics. (R. 323) Can it honestly be said then that there is lacking rationale in the districting of the senatorial districts on the island of Oahu simply because one proposed senatorial district has the same boundaries as a representative district, and another proposed senatorial

district has almost the identical boundaries with another representative district?

3. *The District Court's intimation that the drawing of the senatorial district lines was accomplished in part by gerrymandering is without substance.*

The District Court pointed to the fact that a number of incumbent senators reside within short distance of each other within the proposed Sixth Senatorial District. (R. 163, 240 F. Supp., at 731) It implied that the district was made large enough to accommodate the incumbent senators, and that had the Legislature apportioned the Senate among single-member districts, these incumbents would have been pitted against each other. It is submitted that the District Court's conclusion is purely conjecture. There is no evidence to indicate where the district lines would have been drawn had the Legislature apportioned the Senate among single-member districts. It may well be that a number of the incumbents would have been equally "safe" under a single-member districting system.

The policy questions and factors considered by the Legislature were real enough. That the proposed five Oahu senatorial districts have almost equal numbers of registered voters evidences the good faith of the Legislators. The number of registered voters per senatorial district on the island of Oahu range from 27,073 (with three senators) to 40,628 (with four senators). Each of the proposed four, four-member Oahu senatorial districts has an average of 38,276 registered voters.

The District Court also pointed to the consolidation of the present two senatorial districts on the island of Hawaii into one as evidence of gerrymandering. Yet, it was shown that the present two senatorial districts were combined into one in a large part "to equalize the registered voter popula-

tion of that island with the districts on Oahu to the extent possible." (R. 127, 137-38) No such action could be taken with the less populated islands of Maui and Kauai, because those islands, under the present system, constitute one senatorial district each, and are, by their very nature, basic areas. (R. 127, 137-38) This reasoning of the Legislature is supported by the expert, Robert Schmitt. The natural, historical, geographical, and other considerations would divide the island of Hawaii into the present division of the island, if single-member districting system were to be used. The two areas are divided by lava flows and mountains. (R. 308) Yet, the population disparity between the eastern part of the island and the western part of the island (presently designated first and second senatorial districts, respectively) would cause the western part of the island to be the most overrepresented district in the State. (R. 324) Further, since 1950, the first district has been losing population, and the second district has been picking up population; thus, within the 10 year apportionment period, there would likely be a great population shift, with the result that at the end of the decennial period, there would be a representational disparity and inequity between the two districts. (R. 324, 331-32)

D. There is no evidence that Hawaii's multi-member districting system overrepresents the larger multi-member districts or submerges the minority in the multi-member districts or denigrates majority rule.

Much of the discussion set forth in that portion of this brief relating to the District Court's mandate for homogeneous districts is applicable here. The discussion here is confined to answering the complaints raised by Appellant in Case No. 318. Appellant in Case No. 318 contends that the multi-member districting system of the Hawaii House of Representatives and the Hawaii Senate Reapportion-

ment Plan should be ruled unconstitutional because, he claims, multi-member districting system tends to overrepresent the larger districts, submerge the minority, and denigrate majority rule. The arguments of the Appellant are directed to the alleged results of multi-member districting system. The record in the District Court is devoid of proof to sustain the allegations, and the arguments are the same ones usually advanced by all opponents of the multi-member districting system. They are speculative at best.

1. *There is no evidence showing that the Senate multi-member districting system overrepresents the larger multi-member districts.*

Appellant in Case No. 318 contends that citizens of a single-member district have only one legislator to look to, whereas the citizens, say of a four-member district, have four legislators to look to. Thus, he argues, a person in a four-member district has representational advantage over another in a single-member district. A short answer to this is that the four-member district has a population four times as large as the population of the single-member district, and thus, the voters in a four-member district may vote for four legislators. Without more, it cannot be said that the weight of the vote of a voter in the four-member district is not the exact equivalent of the weight of the vote of a voter in a single-member district.*Fortson v. Dorsey*, 379 U.S. 433 (1965).

It is alleged that as a matter of "political realism," the majority in a large multi-member district will tend to have an inordinate influence in the political life of the State; that a voter, for example, in a four-member district will have four members of the legislature "who will be especially concerned with his views and interests and amenable to his persuasion, since they will want the benefit of his

suffrage for reelection." *Drew v. Scranton*, 229 F. Supp. 310, 327 (M.D. Pa. 1964), *remanded on other grounds*, 379 U.S. 40 (1964). This argument "ignores the practical realities of representation in a multi-member constituency." *Fortson v. Dorsey*, 379 U.S. 433, 437-38 (1965). It assumes that each voter in a four-member district will have influence over all four legislators, and that all four legislators from that district will respond in the same manner or cast their votes in the same fashion in the legislature. There is no assurance that any voter has any influence over any of the four legislators, just as there is no assurance that any voter in a single-member district will have influence over his lone legislator. Then, too, each legislator from a multi-member district depends for his tenure upon a district-wide vote and thus must be vigilant to serve the interests of all the people in the district.

Appellant in Case No. 318 points out that each of the four, four-member senatorial districts controls 16% of the Senate.[16] Thus, he argues, one senatorial district can have a large voice in the Senate. It assumes, however, that all four of the Senators from a four-member district will vote alike, and that all four of them are amenable to a voter or a given group of voters within the district. An analogy is submitted in Appellant's brief to the National Presidential campaign where the candidates concentrate on those states with the largest number of convention or electoral votes. The analogy is misplaced. In the first place, Hawaii legislators are not elected on a state-wide basis making it necessary for candidates to concentrate their campaign on the larger multi-member districts. Each legislator is elected from his own district, confining his campaign efforts to his

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[16]The 17% figure used by the Appellant in Case No. 318 is mathematically incorrect.

district only. In the second place, if Appellant meant to intimate that organized pressure groups or external influence will find their tasks easier by concentrating on Senators from multi-member districts, it assumes that all Senators from one multi-member district will vote alike or that the same effort will not be required to reach the same number of Senators regardless of the districts they represent. Thus, any four Senators will constitute 16% of the Hawaii Senate. What proof is there that it is easier to secure this 16% if they all come from the same district than if they come from different, single-member districts?

It is contended that in Hawaii, even in multi-member districts, the relationship between the legislator and his constituent is direct and immediate. Thus, it is said, the overrepresentation is accentuated. Again, this is an assumption, for which no proof has been offered. And, if it be the case, does it not speak more for the Legislature's determination that public interest requires the election of legislators oriented to state-wide problems rather than purely local issues?

To be sure, this Court in *Fortson v. Dorsey*, 379 U.S. 433 (1965), stated that it was not intimating that in all instances multi-member districting system comports with the dictates of the Equal Protection Clause; that the multi-member districting system might, under the circumstances of a particular case, designedly or otherwise, operate to minimize or cancel out the voting strength of racial or political elements of the voting population. But, it said, "When this is *demonstrated* it will be time enough to consider whether the system still passes constitutional muster." 379 U.S., at 439 (Emphasis added.)

2. *The fact that some multi-member senatorial districts and some representative districts have the same or nearly identical boundary lines does not result in disproportionate representational advantage for the voters of these districts over other voters of the State.*

The District Court held, and the Appellant in Case No. 318 contends, that the large multi-member districts of the Senate superimposed over the large multi-member districts of the House intensifies the overrepresentation of the large districts. (R. 159, 240 F. Supp., at 729; GO-Br. 101) Particular reference is made to the proposed Third Senatorial District and the Eighth Representative District which have the same boundaries, and to the proposed Sixth Senatorial District and the Fifteenth Representative District which have nearly identical boundaries. That area bounded by the proposed Third Senatorial District and the Eighth Representative District will elect three Senators and four Representatives, or approximately 10% overall of both chambers of the Legislature, and that area bounded by the proposed Sixth Senatorial District and the Fifteenth Representative District will elect four Senators and six Representatives, or approximately 13% overall of both chambers of the Legislature. The point, however, that must be remembered is that the reason why the area bounded by the proposed Sixth Senatorial District and the Fifteenth Representative District elects 13% overall of both chambers of the Legislature is that, that area contains 13% of the registered voters in the State. The area bounded by the Third Senatorial District and the Eighth Representative District elects overall approximately 10% of both chambers of the Legislature, because it contains approximately 11% of the registered voters in the State. It would be well to remember, too, that voters in even the smallest representative districts on Oahu,

i. e., the Ninth and the Thirteenth Representative Districts, get to vote for a total of six legislators.[17]

Surely, it cannot be said that the vote of a voter of any district, senatorial or representative, is not approximately equal in weight to that of another voter in another district. Without further evidence, how can it be said that districting of the senatorial and representative Districts, on the multi-member system, "minimizes or cancels out the voting strength of racial or political elements of the voting population," or that there is invidious discrimination. *Fortson v. Dorsey*, 379 U.S. 433 (1965).

3. *There is no evidence showing that the Senate multi-member districting system submerges minorities.*

Appellant in Case No. 318 states that he is not contending that districts must be aligned to assure success at the

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[17]The number of Senators and Representatives which the voters in each representative district on Oahu will vote for, as a result of the proposed Senate Reapportionment Plan and the existing House apportionment, is as follows:

Representative District	Number of Senators	Number of Representatives	Total
8	3	4	7
9	4	2	6
10	4	4	8
11 (Regardless of Precinct)	4	3	7
12	4	3	7
13	4	2	6
14 (Regardless of Precinct)	4	4	8
15	4	6	10
16	4	4	8
17	4	4	8

polls for any race. But, he complains that multi-member districting system denies fair representation to all people and submerges minorities. He states, that under the multi-member districting system, "the majority voice . . . speaks loudly, [but] the minority voice may not speak at all." (GO Br. 80) He admits that no "extensive" proofs were put in as to the details of submergence of minorities, but states that the existence of minorities in the multi-member district is "plain".

As Appellant admits, the record in this case is barren of any evidence showing what group is in the majority or advantaged, what minority is submerged, and how the minority is submerged by the multi-member districting system. Surely, there are minorities in single-member districts just as there are in multi-member districts. How then are the minorities so submerged under multi-member districting system as to violate the Equal Protection Clause, while the same would not be true under the single-member districting system?

"Minority" implies a group of people sharing common interests. But a voter does not necessarily fall within one and only one interest group. Depending on his diversity of interests, he may belong to two or more interest groups. And, he may, at the same time, be in that group which represents the majority on one issue and be in another group which represents the minority on another issue. A majority, it has been said, is temporary; that it is formed by an alliance of groups on a particular issue, which may disperse to form new alliances on another issue.[18] The

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[18]See Dixon, *Crucial Issues in Reapportionment is Between Majoritarian Democracy and Consensus Democracy*, 1963 NAT'L CIVIC REV. 543, 544 (1963); McKay, *The Federal Analogy and State Apportionment Standards*, 38 NOTRE DAME LAW. 487, 498 (1963).

Appellant in Case No. 318 complains that although there is equality in the weight of votes of voters in the Hawaii legislative districting system, there is no equality in representation. But, equality of representation for interest groups cannot be assured unless each interest group is specifically identified and given representatives of its own.[19]

4. *The multi-member districting system does not denigrate the principle of majority rule.*

The contention that multi-member districting system denigrates majority rule is purely conjecture. It has never been shown that the principle of majority rule is any more safe under the single-member districting system than under the multi-member districting system. Theoretically, of course, in a single-member district, the winner of the election, with two candidates running, will have a majority of the votes. But, it is the majority of the votes cast, and not necessarily a majority of the registered or qualified voters within the district. Then, too, the election of legislators in each district by a majority of the votes cast within the district does not necessarily mean that the entire make-up of the Legislature will reflect the sentiments of the majority of the voters throughout the State. Commentators generally agree that it is indeed possible for a party or group to win in several single-member districts by slim margins and secure majority control of the Legislature, and yet not have the majority of the state-wide votes.[20]

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[19]See pp. 63 to 74, *infra*.

[20]This result is possible, for example, if a state were divided into ten single-member districts, with 100 voters in each district. The districts may be so aligned, designedly or otherwise such that Party A candidates may win in six districts by a slim 55 - 45% margin and lose in four districts by a 25 - 75% margin. The total popular vote for Party A candidates would be 430 as compared to the total popular vote for Party B candidates of 570, and yet Party A would be in

Majority rule then is much more than simply winning seats in the districts by a simple majority. Majority rule in a State means rule by the majority of the people *throughout the State*. There is no assurance that this end is achieved better under the single-member districting system than under the multi-member districting system. Indeed, political realities indicate that the principle of majority rule is achieved by a route which entails much more than simply securing the majority of the votes cast within a district. The practice of "block voting" and failure to vote for the full slate, undesirable though they may be, are indeed factors which influence the often delicate balance between a majority and a minority.

In the absence of proof, it is respectfully submitted that it cannot be said that the Hawaii legislative apportionment plan denigrates majority rule or otherwise invidiously discriminates against, or dilutes the weight of the vote of a voter in one district over those of another in another district.[21]

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control of the Legislature. For other examples, see Silva, *Compared Values of the Single- and the Multi-Member Legislative District*, 17 THE WESTERN POLITICAL QUARTERLY, 504, 512-13 (1964); Dixon, *Crucial Issue in Reapportionment is Between Majoritarian Democracy and Consensus Democracy*, 1963 NAT'L CIVIC REV. 543, 545; Dixon, *Apportionment Standards and Judicial Power*, 38 NOTRE DAME LAW. 367, 387 (1963); see also Dixon, *Reapportionment in the Supreme Court and Congress: Constitutional Struggle for Fair Representation*, 63 MICH. L. REV. 209 (1964).

[21]"Students of government have known for years that single-member district system has a strong tendency to overrepresent the majority party." Dixon, *Reapportionment in the Supreme Court and Congress: Constitutional Struggle for Fair Representation*, 63 MICH. L. REV. 209, 227 (1964). Professor Dixon discusses the various ramifications of the multi-member districting system and the single-member districting system and apparently finds that there is no assurance that the minority is not submerged in either system.

IV. THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES DOES NOT REQUIRE THE FORMATION OF HOMOGENEOUS DISTRICTS BASED ON ETHNIC, POLITICAL, SOCIO-ECONOMIC, INDUSTRIAL AND OCCUPATIONAL COMPLEXION IN THE APPORTIONMENT OF THE HAWAII STATE LEGISLATURE, NOR DOES IT REQUIRE THAT EACH OF THESE DIVERGENT INTERESTS HAVE POTENTIALLY EQUAL REPRESENTATION IN THE STATE LEGISLATURE.

Hawaii, by its nature, is multi-racial. It has the aged and the youths among its voter population. It counts among its populace those in the professional class as well as those in the lower socio-economic class, such as laborers, operatives and clerical workers. It has its share of the widows and the retired. Its politics is generally anchored on the two-party system. The District Court in its April decision (R. 151, 240 F. Supp. 724) held that both the House and the Senate must be apportioned among homogeneous districts constructed around these varied interest groups in such manner that each divergent interest may have potentially equal representation in the Hawaii Legislature.

The Hawaii House of Representatives (as apportioned under the Hawaii Constitution) and the Hawaii Senate (as apportioned under the proposed Senate Reapportionment Plan) are both apportioned among districts with substantially equal population, with the resultant substantial equality in the weight of votes of all voters throughout the State. Within the constitutional limitations of equal-populations (and the constitutional prohibition against classification based on race or sex), it is possible for the Hawaii Legislature to be apportioned among districts with widely varying demographic character and political interests. The Equal Protection Clause does not require that the divergent interests be grouped into homogeneous districts. To require judicially that each of the divergent interests be grouped

into homogeneous districts and that each such interest group be given potentially equal representation in the State Legislature is to deny to the political community of Hawaii the right to shape the populace-composition of the legislative districts in the light of its concept of "representative government", its determination of public policy and needs, and the existing conditions within the State.

A. The Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States focuses its attention upon the protection of individuals, not interest groups.

The Equal Protection Clause protects individuals, not special interest groups or classes. Thus, no state is to "deny to *any person* . . . the equal protection of the laws." Of course, an individual may fall within an interest group or class of people, and the voting strength of an individual must not be minimized or canceled out simply because he belongs to a racial, religious or political group. *Fortson v. Dorsey*, 379 U.S. 433 (1965). However, the Equal Protection Clause nevertheless protects a person, not a group or class.

In the apportionment of a state legislature, the Fourteenth Amendment requires that *each man's* vote be given weight equal to the weight of the vote of every other man. While it may be politically or socially desirable or even perhaps necessary that a class or group be represented in the legislature, the Fourteenth Amendment neither requires it nor does it protect it. The State legislature represents people, not groups or classes.

This Court in *Reynolds v. Sims*, 377 U.S. 533 (1964), commented:

> "Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests." *Id.*, at 562.

"But neither history alone, nor economic or other sorts of group interests, are permissible factors in attempting to justify disparities from population-based representation. Citizens, not history or economic interests, cast votes." *Id.*, at 579-80.

"[R]epresentative government in this country is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a State." *Id.*, at 560-61.

If "majority rule" really means what it says, then it must be a majority of the people, and not of groups or group interests.

"Logically, in a society ostensibly grounded on representative government, it would seem reasonable that a majority of the people of a State could elect a majority of that State's legislators. To conduce differently, and to sanction minority control of state legislative bodies, would appear to deny majority rights in a way that far surpasses any possible denial of minority rights that might otherwise be thought to result." *Reynolds v. Sims*, 377 U.S. 533, 565 (1964).

Desirable and even necessary though it may be to provide for the protection of minority groups, the Constitution does not require that each minority group be given representational rights and potentially equal representation in the State Legislature.

Not only does the Constitution not require that groups be given representational rights, the practical problems dictate against it, and it may well be that potentially equal representation of groups will tend to subvert the equal-populations principle.

B. Practical problems militate against the construction of legislative districts around homogeneous interest groups.

There are varied and numerous interest groups in the Hawaii community. Any attempt to structure the legislative districts around homogeneous interest groups is fraught with difficulties.

1. *There is no practical way of determining the relevant minority interest groups which are entitled to representation in the State Legislature.*

Each person belongs to some interest group by choice or otherwise. Thus, by reason of his annual income, he belongs to either the higher socio-economic group or the lower socio-economic group. The fact of birth places him in one racial group or another. By reason of occupation, he may be a laborer or a part of the managerial group or a clerical worker. But a person may belong to two or more minority interest groups at the same time, depending on his varied interests. Thus, he may be a laborer and yet be in the upper middle class; a widower and in the lower income group; a clerical worker and a conservative in politics. And, in each minority interest group, there are likely to be factions or splinter groups. Thus one professional may be a liberal, the other conservative; one in a managerial position in a high income bracket and the other in a low income bracket. And, a person may shift from one interest group to another depending on variable factors. Thus, a clerical worker may become a manager through promotion; a laborer may become a professional through education; and a person in one racial group through inter-marriage may become associated with another racial group. The possibilities are numerous. Each minority group is not confined within any geographic area; it is spread out over the State. It transcends the boundaries of legislative districts and political boundaries.

Out of these minority interest groups a majority in American representative government is formed. A "majority" is an alliance of various minority groups which overlap and intersect. It cuts across racial, ethnic, religious, socio-economic, industrial, occupational and other interest groups. But these alliances are temporary, and, therefore, majorities are temporary. Minority interest groups get together to form an alliance which may be the majority on a given issue. They then disperse to form new alliances on other issues.[22]

In any effort directed toward the creation of homogeneous districts based on interest groups, the inevitable question is, which of the identifiable minority groups are relevant and require representation in the State Legislature. To prefer some is to deny representational rights to others.

The District Court apparently was of the judgment that race, social groupings, economic status, political affiliation, industry and occupation are the relevant groups entitled to representation. It pointed to the proposed Fifth, Sixth, and Seventh Senatorial Districts. It said that the Fifth Senatorial District contains a "multitude of Caucasian widows in the upland areas," "an overabundance of Filipino males in the seaward portion," and a "very high proportion of persons of foreign birth or Asiatic ancestry, of the lower-middle socio-economic group" in the Twelfth Representative District encompassed within the Fifth Senatorial District. (R. 157-158) The Sixth Senatorial District, the court said, contains a high proportion of persons of Japanese ancestry in the Moiliili area, high concentration of Caucasians in the Waikiki area, high-level professional, technical and managerial

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[22]See Dixon, *Crucial Issues in Reapportionment is Between Majoritarian Democracy and Consensus Democracy*, 1963 NAT'L CIVIC REV. 543, 544 (1963); McKay, *The Federal Analogy and State Apportionment Standards*, 38 NOTRE DAME LAW. 487, 498 (1963).

people in Waikiki and upper Manoa, and operatives, laborers, clerical workers, middle and lower-middle income people in the central area. (R. 157) The Seventh Senatorial District, the District Court noted, includes the high income and professional and managerial group of the Seventeenth Representative District and the lower socio-economic laborers, operatives and clerical workers of the Sixteenth Representative District. (R. 158)

The record shows, however, that the Fifth Senatorial District has been rapidly changing from upper middle class residents to an average urban community of below upper middle class (R. 310) ; the drawing of the senatorial district line between the Fifth and Sixth Senatorial Districts separates the industrial Kakaako area from the central business district and provides a "clear distinction between areas of different social and housing, economic characteristics" (R. 323) ; and the division between the Sixth and Seventh Senatorial Districts separates the high-rise and apartment area from the single family residential area (R. 323). Thus, to Schmitt, another relevant group was housing. To this might be added other relevant groups such as age, sex and religion. Any attempt to select from all the possible groups certain ones as relevant and entitled to representation presents opportunities for errors in some interest groups being left out entirely.

The selection of relevant minority groups entitled to representation is further complicated by the difficulty in ascertaining which interest groups are in the majority and which are in the minority. Majorities being temporary, an interest group may be in the majority in one instance and in the minority in another. And, a person belonging to two or more minority interest groups may be in the majority on one issue and in the minority on another. Thus, it is difficult to determine at any given moment whether a person

or an interest group is among the majority or among the minority. The District Court's opinion and the contention of Appellant in Case No. 318 (GO Br. 80-84, 101-02) that minorities are submerged in multi-member districts suffer from this inability to point out who or what group is advantaged and who or what group is disadvantaged by the apportionment of the House and the proposed reapportionment of the Senate. Of the two racial groups in the proposed Sixth Senatorial District, for example, which is the advantaged and which the disadvantaged? In the proposed Seventh Senatorial District, which of the two groups (the professional-managerial, high socio-economic group or the lower socio-economic laborers, operatives and clerical workers) is in the majority and which in the minority? The advantaged and the disadvantaged are not identified in either the District Court's opinion or in Appellant's brief.

The difficulties inherent in identifying the relevant minority groups which should be entitled to representation in the State Legislature, in determining to which minority interest group a person should be placed and the opportunities for errors in some interest groups being left out entirely lead inevitably to the use of geographic districts as the most workable indirect alternative.[23]

2. *The difficulty in identifying relevant groups entitled to representation in the State Legislature was apparent in the Hawaii Reapportionment case.*

Robert Schmitt, the expert witness, was requested by the Governor of Hawaii to prepare a working set of maps showing twenty-five proposed single-member senatorial districts and fifty-one proposed single-member representative dis-

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[23]Lucas, *Legislative Apportionment and Representative Government: The Meaning of Baker V. Carr*, 61 MICH. L. REV. 711, 766 (1963)

tricts. A set of such working maps was prepared based on the 1960 census total population with census tracts and census county division boundaries. (Plaintiffs' Ex. 6, R. 242, 247, 340; Plaintiffs' Ex. 7, R. 243, 249, 341; Plaintiffs' Ex. 8, R. 243, 252 (unprinted); Plaintiffs' Ex. 9, R. 342)[24]

In working up the district lines along census enumeration districts, Schmitt gave homogeneity of the districts little importance, if at all, because of the difficulties entailed.

> "In our set of maps based on census tract boundaries, and using 1960 total population, we disregarded homogeneity of districts, feeling that first of all in the Legislative Reference Bureau's analysis of the Supreme Court decisions, homogeneity had been given, I would say, tertiary importance. The stress had been on substantial [e]quality of population first; second, on contiguity and compactness of the areas. And only after some minor points, social, ethnic, political homogeneity. And, of course, as a practical matter, the very first of those criteria was so difficult to achieve, using the rather unwieldy building blocks we had to work with, that we were happy to achieve this substantial equality of population regardless of any violations of ethnic identity or economic homogeneity . . ." (R. 225)
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> "We could make no effort to try to combine or separate such areas. It was too difficult a task. So we ignored that criteria." (R. 226)

The very homogeneity mandated by the District Court was thus extremely difficult, if not impossible, to attain,

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[24]This set of plans was later set aside and a new set was prepared for the Governor because of mechanical difficulties in the registration of voters if census tracts were used rather than the existing precincts. (R. 224)

even with the use of census tracts as the Appellant in Case No. 318 strongly urges in his brief.[25] The very objection raised by the District Court with reference to the Seventh Senatorial District proposed by the Senate Reapportionment Plan would exist even in single-member districting using census tract lines. There would still be a primarily Caucasian, managerial and strong Republican oriented area and a primarily Hawaiian homestead, low income and strong Democratic inclined area within the same district. (R. 225-226) Unfortunately, the record is barren of any evidence to indicate the heterogenity or homogeneity of the other districts proposed along census tracts. It would not be surprising, however, if some of these other districts built along census tracts were shown to be just as heterogeneous as the existing House districts and the proposed Senate districts.

C. The construction of legislative districts along homogeneous characteristics of the people will tend to subvert the equal-populations principle.

This Court held that geography, political subdivision lines and the principle of compactness and contiguity are indeed not only relevant in the drawing of district lines, but perhaps even necessary if partisan gerrymandering is to be minimized. *Reynolds v. Sims*, 377 U.S. 533, 578-79 (1964). Mindful of this admonition of this Court, the Hawaii Legislature constructed the proposed Senatorial Districts along established geographical, historical, natural and governmental unit lines; it "relied very heavily upon compactness

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[25]Appellant in Case No. 318 suggests that failure to follow census tract lines indicates arbitrariness of the boundaries and district size in the multi-member districting plan for the House and the Senate of the Hawaii Legislature. (GO Br. 74, 102) There is no magic in census tract lines and the State Legislature is surely not required to follow lines established by administrative branches of other levels of government. (See pp. 46 to 51, *supra*.)

and contiguity"; and it considered areas of population concentration and existing communities.[26] The districts have been described as logical and meaningful, and the districts are proportionately equal in population.

If interest groups have right of representation in the State Legislature, that right cannot achieve full vindication nor can the right of representation of every group be potentially equal to the rights of other groups in any representative system where the districts are based primarily on geographic lines and on the principle of compactness and contiguity.[27] A full vindication of that right and a truly equal representational right will require substantial deviation from the rule of equal population districts in the light of the varied sizes of the interest groups and the geographic span of each throughout the state.

D. The role of minority interest groups in representative system of government is for the political body to determine and is better accomplished by the political body.

There are, of course, various ways in which legislative districts can be constructed, and this holds true whether single-member districting system or multi-member districting system is employed. The districts may simply follow natural, geographic, historical and other statistical lines; they may follow existing governmental boundaries; or they may be aligned along functional divisions of the population.[28] The Hawaii Legislature exercised its judgment and constructed the proposed Senatorial Districts substantially

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[26]See pp. 49 to 51, *supra.*

[27]Lucas, *Legislative Apportionment and Representative Government:* The Meaning of Baker V. Carr, 61 MICH. L. REV. 711, 772 (1963).

[28]See DE GRAZIA, APPORTIONMENT AND REPRESENTATIVE GOVERNMENT 20 (1963).

along geographical, historical, natural and government lines. It adhered to the principle of compactness and contiguity. In exercising this judgment, the Hawaii Legislature was concerned that otherwise, districting may provide an open invitation for partisan gerrymandering. (R. 124, 135) The size of the districts and the component parts thereof were all influenced by the shape of existing factors.[29] To conclude from this that the Legislature gave sparse, if any, consideration to the role of interest groups assumes too much.

Along with its decision to follow established lines and to adhere to the principle of compactness and contiguity, the Hawaii Legislature was guided by its policy decision that legislative districts should foster the election of legislators oriented toward state-wide, rather than purely local, problems. (R. 123, 134). Implicit in this policy decision is that legislators ought to represent a middle-of-the-road approach to problems. But, such middle-of-the-road approach is hardly possible if legislators represent identified, specific interest groups. Representatives of special interest groups would naturally tend to take rather narrow viewpoint of the group itself and be strong and positive in their stands.

The question of the role of interest groups in government is indeed part and parcel of the American system of "representative government." To admit that interest groups are relevant in "representative government" is one thing, to give each such group equal representation in the State Legislature is another. What the role of interest groups should be and how government should be structured to enable the interest groups to play that role goes to the core of any theory of "representative government". The task of defining the role and structuring government to enable the inter-

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[29]See pp. 35 to 46, *supra*.

est groups to perform that role is better left to the political arm of government, for the definition and the structure will depend on philosophy, theories, policies and judgment of the political community.

The system of districting which adheres to geographic considerations and to the principle of compactness and contiguity, when coupled with the requirements of equality of population "simply substitute[s] the cast of the dice in terms of concentration and dispersion for some more reasonable effort to see that a wide variety of points of view achieve representation in legislative deliberations." [30] The Hawaii Legislature's determination to foster the election of legislators oriented toward state-wide problems and taking generally a middle-of-the-road approach to problems implies that the Legislature, while cognizant that interest groups do have a role to play in representative government, determined it to be in the best interest of the State that these interest groups find expression through the election of legislators who represent the consensus of the various groups within their respective districts rather than through the direct election of legislators from each of the minority groups.[31]

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[30]Lucas, *Legislative Apportionment and Representative Government: The Meaning of Baker V. Carr*, 61 MICH. L. REV. 711, 772-73 (1963).

[31]"The most workable indirect alternative is, of course, geographical districts. The assumption is that like people are apt to live contiguously, or at least that different areas of the state live with different problems, with all of which the state must deal, and that rational decision on these affairs is aided by the presence of representatives who have lived with them. Representative assemblies are, after all, only partially devices for measuring popular will; they are also deliberative in nature. It is assumed that when the views of a wide sampling of the public have been aired and discussed, action will result or not, according to rational consensus. This is not to say that there may not be issues on which consensus cannot be achieved, but rather that all representative schemes are designed

V. THE DISTRICT COURT ABUSED ITS DISCRETION IN ENJOINING THE LEGISLATURE FROM ENACTING LEGISLATION UNTIL A REAPPORTIONMENT LEGISLATION SATISFACTORY TO THE COURT HAD BEEN ENACTED.

The District Court by its order of April 28, 1965, rejected the Senate reapportionment plan which had been submitted to it by the Hawaii Legislature, and reinstated the injunction contained in its order dated February 17, 1965. The injunction enjoined the Hawaii Third State Legislature from enacting any legislation, except such as were necessary to organize the respective houses at the 1965 regular session and to appropriate funds for the session, until the Legislature enacted appropriate legislation for the submission to the voters of Hawaii the question whether or not a constitutional convention should be convened. (R. 80, 238 F. Supp., at 479)

While patently, the injunction appears to have been aimed at legislative action during the 1965 regular session, which session is now adjourned,[32] the injunction is directed to the individual State Senators and Representatives who are parties to this case and who are all members of the Hawaii Third State Legislature. Under the provisions of the Hawaii Constitution, the life of the Third State Legislature does not expire until at least the next general election (November, 1966) and the Third State Legislature is required

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only partly with an eye to the resolution of such problems. In many instances a preference has been shown for leaving them unsolved until more than a majority can be obtained in support of a particular solution. Sometimes, indeed, we have taken them out of the democratic process altogether." Lucas, *Legislative Apportionment and Representative Government: The Meaning of Baker V. Carr*, 61 MICH. L. REV. 711, 766 (1963).

[32]The 1965 Regular Session of the Third Hawaii Legislature adjourned *sine die* on June 1, 1965.

to convene again in regular session in February, 1966.[33] In addition, the Hawaii Constitution authorizes the Governor of the State to convene the Legislature, or the Senate alone, in special session at any time. Thus, the injunction is conceivably applicable to the actions of the Third State Legislature at its future legislative sessions.

The District Court's injunction is unnecessarily harsh in its terms and constitutes an abuse of judicial discretion.

Article III, section 1 of the Hawaii Constitution provides:

> "The legislative power of the State shall be vested in a legislature, which shall consist of two houses, a senate and a house of representatives. Such power shall extend to all rightful subjects of legislation not inconsistent with this constitution or the Constitution of the United States."

Thus, the Hawaii Legislature is invested with the full panoply of legislative powers. The injunction, however, prevents the State Legislature from exercising these powers. It prevents the State Legislature from considering legislations necessary for, and of vital importance to the health, safety and welfare of the people of Hawaii and the orderly functioning of both State and County governments. It not only prevents the Legislature from considering policy legislations, but it also prohibits the Legislature from considering budgetary items necessary for the normal operation of the State and County governments.

In none of the decisions of the federal district courts, relating to the reapportionment of state legislatures, which have come before this Court for review, except *Fortson v. Toombs*, 379 U.S. 621 (1965), has there been such drastic

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[33]The Hawaii Third Legislature will convene in Regular Session on February 16, 1966.

orders mandating the legislature to pass a constitutionally valid reapportionment plan or enjoining the state legislature from discharging its duties. This Court from time to time has wisely refrained from fashioning remedies or attempting to delineate the boundaries of possible remedies.

In *Reynolds v. Sims*, 377 U.S. 533 (1964), this Court stated:

> "We do not consider here the difficult question of the proper remedial devices which federal courts should utilize in state legislative apportionment cases. Remedial techniques in this new and developing area of the law will probably often differ with the circumstances of the challenged apportionment and a variety of local conditions. * * * In awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws, and should act and rely upon *general equitable principles*. With respect to the timing of relief, a court can reasonably endeavor to avoid a disruption of the election process which might result from requiring precipitate changes that could make unreasonable or embarrassing demands on a State in adjusting to the requirements of the court's decree." 377 U.S. 533, 585. (Emphasis added.)

In the *Reynolds* case, this Court commended the federal district court for acting with "proper judicial restraint" after the Alabama Legislature failed to act effectively in remedying the constitutional deficiencies in the State's legislative apportionment plan. The District Court in Alabama ordered the 1962 elections to be held under a temporary reapportionment plan fashioned by the Court from the best parts of two proposed plans of the state legislature, although both of the proposed plans were constitutionally invalid.

In *Fortson v. Toombs*, 379 U.S. 621 (1965), the State of Georgia was allowed to conduct its 1964 election under an invalid plan. The federal district court had earlier enjoined the state election officials from placing on the ballot in the 1964 election or at any subsequent general election any constitutional amendment proposed by the invalidly apportioned Georgia Legislature. On the date of the 1964 general election, the order was amended to authorize the election of the state legislature under the invalid plan; the order, as amended, however, enjoined the legislature elected in 1964 from conducting any legislative business except during the 1965 45-day session. This amended order, in effect, enjoined the legislature elected in 1964 from conducting any legislative business in the 1966 session.

While this Court did not pass on the question of the validity of the amended order restricting the legislature elected in 1964 from conducting any legislative business in 1966, this observation was made in that opinion which concurred in part with, and dissented in part from the majority opinion:

> "[A]s to the provision of the lower court's original decree limiting the functions of the 1964 legislature, it seems scarcely open to serious doubt that so long as the federal courts allow this Georgia Legislature to sit, it must be regarded as the de facto legislature of the State, possessing the full panoply of legislative powers accorded by Georgia law." 379 U.S., at 626.

In *Roman v. Sincock*, 377 U.S. 695 (1964), suit to reapportion the state legislature was commenced in early 1962. The District Court stayed the proceedings to give the legislature time to enact an amendment to the constitution by August 7, 1962. On July 30, 1962, the legislature passed an amendment to the constitution. The constitution required a

two-thirds vote in each of two successive state legislative sessions for the amendment to become effective. In August of 1962, the District Court denied further stay of proceedings, but it also denied the preliminary injunction to prevent the November 1962 election from being held under the old, invalid constitutional provision. In January, 1963, the legislature adopted the proposed constitutional amendment for the second time by the necessary two-thirds vote. In April, 1963, the District Court held that both the old constitutional provision and the amendment were invalid and contrary to the Fourteenth Amendment of the Constitution of the United States, and gave the legislature until October, 1963, to adopt a constitutionally valid plan for use in the 1964 election. This Court upheld the District Court's injunction, but remanded the case to the District Court and left it up to the District Court to determine whether or not the state legislature should have additional time for enactment of a constitutionally valid reapportionment plan.

The Hawaii Legislative Apportionment case has been before the District Court since August, 1964. At the time of the writing of this brief, it is not quite a year and a half since the original suit was filed. Most of the State legislative apportionment cases which have come before this Court have had juridical history lasting far more than the year and a half experienced by Hawaii.[34] Yet, in all of these cases, this Court remanded for further proceedings, confident that the District Courts would fashion appropriate remedies in accordance with equitable principles.

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[34]In *Reynolds v. Sims*, 377 U.S. 533 (1964), suit began on August, 1961, and this Court did not render its decision until 1964; in *Maryland Committee v. Tawes*, 377 U.S. 656 (1964), suit was commenced in August, 1960, and this Court did not dispose of it until June, 1964; in *Davis v. Mann*, 377 U. S. 678 (1964), suit was filed in April, 1962, and this Court rendered its decision in June, 1964.

It was hardly necessary for the Hawaii District Court to resort to such drastic measures. The Hawaii Legislature made two good faith attempts to fashion a constitutionally acceptable reapportionment plan, one at a special session in 1964, and again at its regular session in 1965. There is nothing in the record to indicate that the Hawaii Legislature would not have made further good faith attempts to fashion a plan constitutionally acceptable. In the light of this, enjoining future elections under the invalid Hawaii constitutional provisions, coupled with its powers to fashion at least temporary apportionment of its own would have served just as effectively in prodding the Hawaii Legislature to act with deliberate speed.

The error of the District Court lay in its belief that a constitutionally acceptable *permanent* plan was necessary for the 1966 general elections. None of the cases which have come before this Court and nothing in the record of this case indicate the necessity for fashioning a permanent reapportionment plan at such rate of speed to protect the rights of plaintiffs. Courts in other state reapportionment cases have proceeded cautiously and no more rapidly than was inescapably necessary.

VI. THE HAWAII LEGISLATURE HAS THE POWER TO ENACT AT LEAST A PROVISIONAL REAPPORTIONMENT PLAN FOR THE SENATE, PENDING ADOPTION OF A VALID CONSTITUTIONAL AMENDMENT, AND TO PROPOSE SUCH CONSTITUTIONAL AMENDMENT BY STATUTE.

The District Court in its order of February 17, 1965, held that the reapportionment of the Senate of the Hawaii Legislature must be by constitutional amendment. (R. 78, 238 F.Supp., at 478) While the District Court, by its order dated March 9, 1965, lifted temporarily its injunction contained in its order of February 17, 1965, to permit the Ha-

waii Legislature to enact appropriate reapportionment and redistricting plan for the Senate to be applicable in the 1966 elections, upon rejection of the plan submitted to the court on April 14, 1965, the District Court reinstated its initial injunction.

A. The District Court erred in precluding the formulation by the Hawaii Legislature of at least a provisional Senate reapportionment plan, pending the adoption of a valid amendment to the Constitution of the State of Hawaii. The injunction makes no provision for the enactment by the Hawaii Legislature of any reapportionment plan for the Senate.

The District Court having declared those provisions of the Hawaii Constitution relating to the apportionment of the Senate of the Hawaii Legislature invalid, those invalid provisions are no longer part of the Hawaii Constitution, and the Hawaii Legislature has inherent power to enact at least provisional reapportionment legislation. In *Maryland Committee v. Tawes*, 377 U.S. 656 (1964), this Court, upon holding pertinent provisions of the Maryland Constitution relating to legislative apportionment invalid, said:

> "With the Maryland constitutional provisions relating to legislative apportionment hereby held unconstitutional, the Maryland Legislature presumably has the inherent power to enact at least temporary reapportionment legislation pending adoption of state constitutional provisions relating to legislative apportionment which comport with federal constitutional requirements." *Id.*, at 675-76.

The Constitution of the State of Hawaii in Article III, Section 1, grants to the State Legislature, broad powers extending to "all rightful subjects of legislation not inconsistent with this constitution or the Constitution of the United States." With the invalid Hawaii constitutional provisions relating to legislative apportionment no longer

a part of the Hawaii constitution, the matter of legislative apportionment becomes one of the "rightful subjects of legislation not inconsistent with this constitution" which can be dealt with by the Hawaii Legislature. This is in keeping with the holdings of this Court in *Maryland Committee v. Tawes*, 377 U.S. 656 (1964) and *Roman v. Sincock*, 377 U.S. ~~702~~ 695 (1964), that the primary responsibility for legislative reapportionment is in the state legislature.

B. The District Court erred in precluding the Hawaii Legislature from proposing necessary constitutional amendment for submission to the electorate.

The District Court's injunction mandated that the Hawaii Constitution be amended by the route of a constitutional convention. Under Article XV of the Hawaii Constitution, constitutional amendments may be proposed by (1) the constitutional convention; or (2) by the Legislature. A legislative proposal to amend the constitution requires the passage of the proposal by a two-thirds vote of each house of the Legislature at any session or by a majority vote of each house of the Legislature at two successive sessions. Hawaii Const., Art. XV, Section 3.

The District Court's mandate effectively precludes the Hawaii Legislature from formulating necessary constitutional amendments for submission to the electorate, or from, at least, exercising a choice between the legislative route and the more expensive route of a constitutional convention in amending Hawaii's Constitution.

Perhaps the District Court erroneously assumed that there could be no validly acceptable proposal for a constitutional amendment proposed by the Legislature, in the light of its failure to provide an acceptable provisional plan during the time alloted by the court in its March order. There is no valid basis upon which to speculate that the

Hawaii Legislature would not come up with a constitutionally acceptable provisional reapportionment and an acceptable permanent plan for submission to the electorate, should this Court reject the proposed apportionment of the Senate or the existing apportionment of the House of Representatives. Nor is there any evidence upon which to ground a belief that a provisionally reapportioned Hawaii Legislature would not enact and submit to the electorate an acceptable constitutional amendment.

The error of the District Court, further, lay in its belief that a permanent apportionment plan for the Hawaii Legislature must be in effect for the 1966 general elections (R. 78, 238 F. Supp., at 478).

Equitable considerations favor permitting Hawaii to exercise the option it has of choosing the route it shall take to amend its constitution.

C. The District Court erred in ordering that a constitutionally acceptable legislative apportionment plan be in effect for the 1966 General Elections.

The District Court by its February 17, 1965 order required that a constitutional convention be convened not later than October 15, 1965, and that proposed amendments to the Hawaii Constitution, relating to legislative apportionment be submitted to the electorate by not later than January 30, 1966 (R. 80, 238 F. Supp., at 479). The District Court in suspending its injunction by its March order, nonetheless required that a provisional plan be in effect for, and a permanent plan be submitted to the electorate at the November 1966 general election. (R. 89-90)

There is nothing in the record to indicate that such rapid time-table was necessary for the enactment of a permanent reapportionment plan. Nor has this Court in any of the cases coming before it, required so rapid a time-table for

the enactment of a permanent reapportionment plan. In *Reynolds v. Sims*, 377 U.S. 533 (1964), this Court noted that the district court "acted in a most proper and commendable manner," *Id.*, at 586, in putting into effect for the 1962 general election a plan of its own as a provisional measure, although admittedly, that plan, taken from the best parts of two legislatively proposed but constitutionally invalid plans, was itself invalid as a permanent apportionment of the state legislature. Then, in *Roman v. Sincock*, 377 U.S. 695 (1964), this Court remanded the case to the district court with the suggestion that the district court could determine whether or not the state legislature should have additional time for enactment of a constitutionally valid reapportionment plan, although the district court had earlier ordered that the Legislature come up with a plan not later than October, 1963, for use in the 1964 election.

In like vein, equitable principles suggest that the District Court exercise greater judicial discretion in permitting the Hawaii Legislature opportunity to consider both temporary and permanent apportionment plans.

VII. THE REFUSAL OF THE DISTRICT COURT TO INVALIDATE ALL PORTIONS OF THE HAWAII CONSTITUTION RELATING TO LEGISLATIVE APPORTIONMENT, EXCEPT THAT PORTION RELATING TO THE APPORTIONMENT OF THE SENATE, WAS PROPER.

The District Court's February order invalidated those provisions of Article III, Section 2 of the Hawaii Constitution fixing the number of Senators per Senatorial District. The remainder of Article III was declared constitutional and valid. (R. 79, 238 F. Supp., at 478) The Apellant in Case No. 318 contends that this was error and that the District Court should have invalidated all of the provisions

of Article III of the Hawaii Constitution relating in any manner to the apportionment of both the House and the Senate, including the provisions relating to the numerical sizes of both houses, restricting changes in the House district boundaries on decennial reapportionments, and requiring decennial reapportionments on the basis of the number of voters registered at "the last preceding general election."

A. The District Court's refusal to invalidate that portion of the Hawaii Constitution relating to the apportionment of the House of Representatives was proper.

The Appellant in Case No. 318 urges that the District Court, when it invalidated the Hawaii constitutional provisions fixing the number of Senators per senatorial district, should have also invalidated those provisions relating to the apportionment of the House, whether or not the House, taken alone, met the constitutional test of the Equal Protection Clause. The District Court's refusal to invalidate the constitutional provisions relating to the apportionment of the House was couched in these words:

> "3. The plaintiffs and intervening plaintiffs have failed to prove that the apportionment of the House of Representatives of the Legislature of the State of Hawaii causes any invidious discrimination in the weight of their vote or that such apportionment is the result of arbitrary or capricious action. Their prayers for relief in this respect are therefore denied." (R. 79-80, 238 F. Supp., at 478-79)

This Court held in *Maryland Committee v. Tawes*, 377 U.S. 656, 673 (1964):

> "Regardless of possible concessions made by the parties and the scope of the consideration of the courts below, in reviewing a state legislative apportionment case

this Court must of necessity consider the challenged scheme as a whole in determining whether the particular State's apportionment plan, in its entirety, meets federal constitutional requisites. It is simply impossible to decide upon the validity of the apportionment of one house of a bicameral legislature in the abstract, without also evaluating the actual scheme of representation employed with respect to the other house. Rather, the proper, and indeed indispensable, subject for judicial focus in a legislative apportionment controversy is the overall representation accorded to the State's voters, in both houses of a bicameral legislature. We therefore reject appellee's contention that the Court is precluded from considering the validity of the apportionment of the Maryland House of Delegates."

These Appellants in No. 409 do not contend that this Court should not look at the apportionment of the Hawaii House of Representatives in ruling on the validity of the Hawaii Senate Reapportionment Plan, but do contend that even when viewed in the light of the apportionment of the House of Representatives, the Senate Reapportionment Plan is constitutionally acceptable, and that the apportionment of the House and the proposed reapportionment of the Senate both meet the requirements of the Equal Protection Clause.

In *Maryland Committee v. Tawes*, 377 U.S. 656 (1964), this Court did not hold that the district court could not find one house of a bicameral state legislature to be validly apportioned and the other not. What this Court held was that *upon review* by this Court it will view the apportionment of the legislature as a whole. One house of a bicameral legislature, by itself, may be constitutionally apportioned, although it may contain minor disparities from the equal-

populations principle. This Court is concerned that those minor disparities may be aggravated upon the reapportionment of the other house as to make the apportionment of the entire house constitutionally suspect. Thus, it necessarily must view the entire legislative apportionment, even though only one house of the legislature is the subject of reapportionment, and regardless of the matters decided by the district court to determine whether the disparities, if any, in the house found constitutionally valid, are offset or aggravated by the reapportionment of the other house.

"Deviations from a strict population basis, so long as rationally justifiable, may be utilized to balance a slight overrepresentation of a particular area in one house with a minor underrepresentation of that area in the other house. But, on the other hand, disparities from population-based representation, though minor, may be cumulative instead of offsetting where the same areas are disadvantaged in both houses of a state legislature, and may, therefore render the apportionment scheme at least constitutionally suspect." *Lucas v. Forty-Fourth General Assembly of Colorado*, 377 U.S. 713, 735, note 27 (1964).

Continuing, this Court said:

"Of course the court below can properly take into consideration the present apportionment of seats in the House [which was apparently properly apportioned on the equal-populations principle] in determining what steps must be taken in order to achieve a plan of legislative apportionment in Colorado that sufficiently comports with federal constitutional requirements." *Ibid.*

Thus, *Maryland Committee v. Tawes*, 377 U.S. 656 (1964), was not meant to preclude the power of the lower courts

to uphold the validity of the apportionment of one house of a bicameral legislature. Lower courts have, at least, a discretion whether or not to recognize the validity of the apportionment of one house in determining the course it will take to cause the state legislature to be apportioned in accordance with the mandates of the Equal Protection Clause. In the case of the Hawaii Legislature, the District Court exercised that discretion, and, in an effort to bring about the apportionment of the Legislature as a whole to comport with the Equal Protection Clause, it ordered the Senate to be reapportioned. The State Legislature did just that. The subject of inquiry before this Court is whether or not the proposed Senate Reapportionment Plan resulted in the apportionment of the State Legislature which complies with the requirements of the Equal Protection Clause. In making that determination, this Court is not precluded from viewing the proposed Senate reapportionment in the light of the apportionment of the House of Representatives.

In the *Lucas v. Forty-Fourth General Assembly of Colorado*, 377 U.S. 713 (1964), the subject of scrutiny was the State constitutional amendment reapportioning both houses of the Colorado Legislature. Both the parties and the district court assumed that the Colorado House was properly apportioned on the equal-populations principle by a statute passed pursuant to that constitutional amendment. This Court held it need not pass on the validity of the House apportionment since the Senate, apportioned pursuant to the same constitutional amendment, was clearly not apportioned in compliance with the equal-populations principle. In the case of Hawaii, both the House and the Senate as proposed are apportioned on the principle of equal populations.

In *Maryland Committee v. Tawes*, 377 U.S. 656 (1964), both houses were in fact apportioned on basis other than

the equal-populations principle. In contrast, the Hawaii House of Representatives was, from the inception of this case, apportioned on the equal-populations principle, and the Senate Reapportionment Plan resulted in both houses of the Hawaii Legislature being apportioned on the equal-populations principle.

Having passed that test of equal-population, the burden then was upon the opponents of the proposed apportionment of the Hawaii Legislature to demonstrate wherein such apportionment of the Hawaii Legislature was so invidious or without rationality or reflective of no policy as to violate the Equal Protection Clause.[35] That the burden has not been carried is amply shown above in this brief. It is enough to summarize here that no proof was ever offered in the District Court to support the Appellant's alleged speculative results which he says flows from the apportionment of the Hawaii Legislature.

B. The District Court's refusal to invalidate that portion of the Hawaii Constitution relating to the numerical sizes of the House and the Senate, the restrictions on changes in House district boundaries on decennial reapportionments, and the last general election as the basis for determining the number of voters registered on decennial reapportionments was proper.

1. *Numerical sizes.* There is no magic in the numerical size of the respective houses of the State Legislature. The Proceedings of the Hawaii Constitutional Convention reveal that much thought went into the selection of a 25-member Senate and a 51-member House. (Plaintiff's Ex. 11, R. 258, 343)

Thus, with respect to the Senate:

"The Committee proposal increases the membership of the senate from its present 15 to 25. . . . The majority

[35]See pp. 20 to 26, *supra*, on the matter of burden of proof.

of the members of the Committee felt that the present size of the senate, 15 members, was too small. There was general agreement that it should be larger. There was no unanimity as to the exact size that it should be.

" . . .

"This was not the only size for the senate that was considered. The Committee discussed retaining the present 15 member senate, a senate of 19 members, a senate of 20 members with the Lieutenant Governor as its presiding officer, a senate of 21 members and a senate of 23 members. . . . The retention of a 15 members senate was vigorously proposed by some members, but was rejected by a majority of the committee members." (R. 346)

With respect to the House:

"A majority of the members of your Committee was of the opinion that the present representation enjoyed by the neighbor islands should not, at least for the present time, be decreased. With a 51-member house, apportioned equally among the several major island units, the present representation is maintained, although the representation for the island of Oahu is increased from twelve members to 33 members.

"The cost to the state of a Legislature, with a 51-member house and a 25-member senate, was discussed at some length by your committee incident to the question of having biennial or annual sessions of the legislature . . . the majority of the members of the committee felt that the state could afford to have both a large legislature and annual sessions."

The numerical size of the legislature rests on the judgment of the body politic. *Reynolds v. Sims*, 377 U.S. 533,

581, note 63 (1964). The Hawaii Constitutional Convention exercised that judgment. The District Court found that there was nothing invidious about the selection of the numbers 25 and 51 and pointed to Plaintiffs' Exhibit 14, Table 14 (R. 260, 374), as clearly illustrating that there is "no built-in magic or invidiousness in the use of such numbers." (R. 66, note 4, 238 F. Supp., at 472, note 4)

The body politic, through the Hawaii Constitutional Convention, having exercised its judgment, the District Court acted properly in refusing to substitute its judgment for that of the body politic. Simply because the District Court did not invalidate the numerical size of each house of the Hawaii Legislature, did not prevent the Hawaii Legislature from considering a change in the numerical size of the Senate in drafting the Senate Reapportionment Plan. After all, the task before the Legislature was the proper apportionment of the Senate, and consideration of any factor designed to bring this about would not have been improper. Yet, the very fact that the Legislature chose to apportion the 25 members of the Senate impliedly suggests that the Legislature exercised its judgment to retain that numerical size of the Senate.

2. *Restrictions on changes in the House district boundaries.* Article III, Section 4 of the Hawaii Constitution provides for decennial reapportionment of the House of Representatives. It provides that the total number of Representatives shall be apportioned among the districts and that if upon any reapportionment, the total number of voters registered in any representative district is less than one-half of the quotient obtained by dividing the total number of registered voters by 51, then the "basic area" in which that representative district is located shall be redistricted. Appellant in No. 318 contends that this freezes the

existing representative districts in any reapportionment of the House, that the District Court's failure to invalidate this section of the Hawaii Constitution led to the "freezing" of the choice of the Legislature in the reapportionment of the Senate.

The drawing of district boundary lines, unless it leads to a disparity in the weight of the votes of the voters, does not in and of itself violate the Equal Protection Clause. As it will be pointed out, the drawing of the House district lines was based on constitutionally acceptable standards of compactness and contiguity and followed closely geographical, historical and natural lines.

To assume that the failure to invalidate this section limited the choice of the Legislature in the reapportionment of the Senate fails to take into account the power of the Legislature, had it chosen to do so, to propose constitutional amendments shifting the House boundary lines in drafting the Senate Reapportionment Plan. There is nothing in the record to indicate that the Legislature would not have arrived at the same result as the Delegates to the Constitutional Convention of Hawaii in the drawing of the House district lines, if Article III, Section 4 of Hawaii Constitution as now constituted was held invalid by the District Court.

Both the freezing of the numerical size of the houses in the Legislature and the freezing of the boundary lines for legislative districts are intended to prevent that very practice of gerrymandering which this Court in *Reynolds v. Sims*, 377 U.S. 533 (1964), cautioned against. To permit unlimited changes in the numerical size of the respective houses and district boundary lines at every decennial census is "little more than an open invitation to partisan gerrymandering." *Id.*, at 579.

"The various restrictions [prohibiting the division of a political unit unless it is entitled to two or more representatives and requiring districts to be compact and contiguous] are designed to accomplish two basic purposes. First, they are intended to reduce the influence of political factors in drawing legislative district lines. No criteria have been developed which can completely eliminate the political factors from the process of drawing legislative district lines. Second, these various limitations also tend to permit legislative districts to be made up of areas that have common or conflicting interests as the apportioning body may determine."[36]

The possibility of such gerrymandering was indeed in the minds of the Delegates to the Constitutional Convention when they "froze" the representative district lines. The Committee responsible for drafting the Legislative Sections of the Hawaii Constitution did not deem it advisable "to provide for complete redistricting of the State at the time of each reapportionment." (R. 350) To minimize further the possibility of gerrymandering the Constitutional Convention gave the task of reapportionment and re-districting, if necessary, to the Governor of the State. (R. 350)

The District Court properly left this judgment of the body politic intact in refusing to invalidate this portion of the Hawaii Constitution.

3. *Decennial reapportionment.* Article III, Section 4 of the Hawaii Constitution further provides that the House shall be reapportioned decennially. Appellant in No. 318 contends that this provision prevents the use of any other representation measure than the registered voter measure

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[36] Advisory Commission on Intergovernmental Relations Report A-15, 55 (1962).

and should, therefore, have been ruled invalid by the District Court This assumes, of course, that the registered voter measure is not constitutionally acceptable, and that is the subject of discussion in another part of this brief.[37] It is to be remembered that the Hawaii Constitution was drafted in 1950. Pursuant to Section 4 of Article III, providing for decennial reapportionment, the Governor of Hawaii in 1959 reapportioned the House of Representatives among the eighteen districts. Since the Hawaii Constitution required the decennial reapportionment to be measured on the number of voters registered at the last preceding general election, the Governor necessarily took the 1958 registered voters count in reapportioning the House. Appellant in No. 318 suggests that basing decennial reapportionments on the registered voters measure, even if proper, would not reflect the "total population" of Hawaii, since the decennial census will always take place one year after the House has been reapportioned.

As the District Court noted, there is nothing invidious about the fact that the Hawaii decennial reapportionment of the House happens to fall one year before the decennial census. And, if the measure of population on the registered voters basis is constitutionally acceptable, the results of the census are hardly relevant in arriving at the population base for the purpose of Hawaii reapportionment.

4. *The District Court's failure to invalidate all portions of the Hawaii Constitution relating to the apportionment and reapportionment of both the Senate and House cannot be said to have made the task of the Legislature more difficult by limiting the choices in any reapportionment plan.*

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[37]See pp. 95 to 109, *infra.*

There is nothing in the record to indicate that the Legislative action would not have produced an apportionment of the Hawaii Legislature substantially in the manner as the one now before this Court had the District Court invalidated all of Sections 2, 3 and 4 of Article III of the Hawaii Constitution. It would appear, that with the invalidation of these sections, if anything, the problems of the Legislature would have been compounded.[38]

VIII. THE DISTRICT COURT CORRECTLY HELD THAT "REGISTERED VOTERS" IS A CONSTITUTIONALLY VALID MEASURE OF "POPULATION" IN THE APPORTIONMENT OF THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE HAWAII LEGISLATURE.

The District Court in its February decision upholding the validity of the apportionment of the House of Representatives of the Hawaii Legislature held that the use of "registered voters" as the measure of "population" is constitutionally permissible. (R. 75, 238 F.Supp., at 476) Then in its amended March order, the District Court required the Hawaii Senate to be apportioned "on the basis of the number of voters registered in the 1964 general election." (R. 95) In its April decision, while holding that the Senate Reapportionment Plan was not acceptable, the District Court noted that the plan, based on the number of "registered voters" did conform "to the standards required under

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[38]It is not clear whether the Appellant in No. 318 is contending that Section 5 of Article III of the Hawaii Constitution should also have been invalidated. Section 5 provides for tenure of office of Senators and Representatives. Tenure is surely just as much a part of the legislative make-up as districts and sizes of the houses and is often considered in constructing the state Legislature. The relative length of term was indeed considered by the Hawaii Constitutional Convention in drafting the constitutional provisions relating to the State Legislature (R. 350) and by the Hawaii Legislature in planning the reapportionment of the Senate. (R. 123, 134)

the method of equal proportions prescribed by the Constitution of the State of Hawaii and thus [met] that one test of constitutionality." (R. 155, 240 F.Supp., at 727)

Contrary to the contention of Appellant in Case No. 318, the upholding of the "registered voters" measure of representation for both houses of the Hawaii Legislature was correct.

A. "Registered voters" is a permissible basis upon which the State Legislature may be apportioned in complying with the requirements of the equal-populations principle under the Equal Protection Clause.

The Equal Protection Clause protects "a person" against invidious discrimination. A complaint that one has been denied the equal protection of the laws, is a complaint that he has been invidiously discriminated against. As applied to State legislative apportionment problems, the alleged discrimination is that the complainant's vote is worth less than the vote of another. A complaint that one's vote is weighted unequally in comparison to the weight of the vote of another person implies that the complainant has the right to vote. Yet, not every person is entitled to vote in American and citizenship which he must meet to become eligible to democracy. There are qualifications such as age, residence vote. This Court held in *Gray v. Sanders*, 372 U.S. 368 (1963), that "States can within limits specify the qualifications of voters in both state and federal elections," and that "the Constitution indeed makes voters' qualifications rest on state law even in federal elections." *Id.*, at 379.

Thus, the focus of the Equal Protection Clause in legislative apportionment cases is the *qualified voter*. "A person" in this context means a person qualified to vote.

". . . all *qualified voters* have a constitutionally protected right to vote . . . and to have their votes counted . . ." Reynolds v. Sims, 377 U.S. 533, 554 (1964). (Emphasis added.)

The gist of the *Reynolds* case, and the companion state legislative apportionment cases, is that each qualified voter's vote must be substantially equal in weight to the weight of the votes of other voters. "Equality of voters" is the concern here of the Equal Protection Clause.

"[T]he Equal Protection Clause guarantees the opportunity for equal participation by *all voters* in the election of state legislators." *Reynolds v. Sims*, 377 U.S. 533, 566 (1964). (Emphasis added.)

"Once the geographical unit for which a representative is to be chosen is designated, *all who participate in the election* are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit." *Gray v. Sanders*, 372 U.S. 368, 379 (1963). (Emphasis added.)

While fair and effective representation is the goal, equal representation is not the right protected by the Equal Protection Clause. What is protected is the right to vote on the part of qualified voters.

"It is not surprising that our Court has held that this Article [Article I, section 2, Constitution of the United States] gives persons *qualified to vote* a constitutional right to vote and to have their votes counted . . . No right is more precious in a free county than that of *having a voice in the election* of those who make the

laws under which, as good citizens, we must live." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). (Emphasis added.)

Fair and effective representation cannot be achieved, much less guaranteed, by legislative apportionment alone. As observed earlier, fair and effective representation depends on the structure of variety of inter-related factors.

"Representative government is in essence self-government through the medium of elected representatives of the people." *Reynolds v. Sims*, 377 U.S. 533, 565 (1944). To assume that a voter, when he casts his ballot, votes for a representative to represent the views of the non-voter is to assume too much. He votes for a representative whom he feels can best represent *himself* and *his* points of view. If representation is to find effective and meaningful expression, then surely voting is the primary way to achieve this. Those who fail to vote cannot find meaningful representation except in an indirect fashion, depending on the manner in which the various facets of government are structured. To grant direct representation to those who do not participate in the electoral process is to penalize those who affirmatively act to assure direct and effective representation of themselves.

The fact that not only voters are subject to taxes imposed by the Legislature, attend schools or otherwise enjoy the benefits provided by the state, or live in areas where legislative attention is required does not mean that every such person is entitled to representation. Otherwise, all persons, whether in institutions, aliens or out-of-staters, who for one reason or another pay taxes or are subject to the laws of the State, are entitled to representation and to participate in the electoral process to make that representation meaningful. Yet, this Court in *WMCA, Inc. v. Lomenzo*, 377 U.S.

633 (1964), noted that aliens are excluded from consideration for the purposes of legislative apportionment in the State of New York and apparently did not find anything invidious about it, and writers on apportionment and the States themselves exclude persons residing in institutions from the right to vote.[39]

While those who do not participate in the electoral process, to be sure, are just as much in need of the protection and care of the State, to insure that their voices are heard in the State legislative halls requires the structuring of the various facets and processes of government, a task better left to the political arm of government. Much of the determination of the political body will be influenced by needs and public policy considerations.

Then, too, in achieving fair and effective representation for all, the State must be constantly vigilant to insure the maximum opportunity for participation in the electoral process of the State in order that the citizens' qualifications to vote are not unconstitutionally or unnecessarily restrictive. But, this is a problem of voter-registration, not one of legislative apportionment, and is not the problem before this Court. (R. 73, 238 F.Supp., at 475)

The analogy to the United States House of Representatives which is apportioned on the basis of gross census population is not applicable to state legislative apportionment. The use of gross census population is specifically mandated by the Constitution of the United States.[40] No equivalent mandate can be found in the Constitution with respect to state legislatures. In addition, there is much to be said for basing representation in the United States House of Rep-

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[39]See ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS REPORT A-15, 30 (1962).

[40]U.S. CONST., Amend. XIV, § 2.

resentatives on gross census population, inasmuch as the states differ in voter qualifications. Thus as the Advisory Committee on Intergovernmental Relations concluded:

> "Any of the above measurements of population [straight population, qualified voters, registered voters, and actual voters] in the apportionment of one or both houses of a State legislature would appear to satisfy any Fourteenth Amendment requirement." [41]

B. The use of the census total population in Hawaii to measure "equal-population" tends to dilute the weight of the vote of voters in districts where a smaller number of nonvoters reside.

Equality in the weight of votes is a comparison of the weight of the vote of a voter against the weight of the votes of other voters. If a voter in one district is permitted to vote for two legislators simply because his district has two times as many people as a single-member district, although the voter populations of the two districts are numerically equal, the weight of the vote of the voter in the two-member district is two times as great as the weight of the voter in the single-member district. When a voter casts his vote, it is to be remembered that he expresses *his* choice for a representative to represent *his* views, not of others. The voter in a two-member district, by reason of the non-vote by one-half of the people in his district, thus receives the benefit of the weight of the votes which the non-voters would have had had they been voters. The electoral power of the voter in the two-member district is thus twice as great as the power of the voter in the single-member district. The weight of a voter cannot be equal to that of another, if the other is permitted to use the vote of a non-voter to select additional

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[41] ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS REPORT A-15, 32 (1962).

representatives. But such is precisely the result in Hawaii if the census total population is used to measure equal-population among districts.

1. *Hawaii's census "total population" figure does not accurately reflect the number of citizen-residents and inhabitants of Hawaii.*

Hawaii has become one of the nation's largest complex of military bases. The United States' Census Bureau estimated that during the period between 1950 and 1962, the number of military personnel (not including dependents) rose from a low of 21,000 to a high of 79,000. (R. 388) In 1960, military personnel, not including dependents, numbered 47,267 (by the census estimate) or 54,000 (by the Defense Department's estimate) or 52,881 (by the report of local commanders to the State Department of Planning and Economic Development) (R. 393, 134) [42]

The military, by its nature, is highly mobile, and the number in Hawaii fluctuates violently as the need for military action demands. (R. 71) Yet, all of the military personnel and their dependents are included in the "total population" of Hawaii by the United States Bureau of Census. (R. 209) It includes all military personnel stationed ashore in Hawaii, on board ship which happened to be in Hawaii's port on the census date, and all of their dependents whether living in military housing or on military base or in areas normally inhabited by residents of Hawaii. All of them are included in the total population of Hawaii, regardless of their length of stay in Hawaii or its port, and regardless of their legal or voting residences.

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[42]As stated in Defendant's Ex. A (R. 204, 392), the Bureau of Census takes the position that the discrepancy between its figure and the Defense Department's figure is attributable to misreporting of servicemen as civilians in the census.

In addition to its being one of the nation's largest complex of military bases, Hawaii is the focal point for thousands of tourists. In the census count, all tourists in Hawaii on the day of the count are recorded. (R. 209) Based on the statistics of the Hawaii Visitors' Bureau, there were approximately 10,000 tourists in Hawaii on the day the 1960 census was taken. (R. 210) To be sure, an attempt is made to reallocate the number of tourists to their home states and the number of reallocation is "substantially accurate," but the reallocation is not based on any census information and there is no certainty how many in 1960 were reallocated; "it is assumed that all of them were." (R. 209-10, 211)

Included in the census "total population" of Hawaii are also the aliens who are not eligible to vote (R. 208-09). In 1960, it is estimated that there were 51,316 persons 20 years and over who were not eligible to vote because of alienage. (397)

From the foregoing, it is clear that the "total population" figure based on the census is hardly a true measure of the number of citizen-inhabitants actually residing in Hawaii. Can it be seriously contended that all transients and temporary visitors in Hawaii should be entitled to representation in the State Legislature? If so, should they not be entitled to vote to make their representation fully meaningful and effective. Yet, the State has, within constitutional limitations against discrimination based on race or sex, power to determine voter qualification. *Gray v. Sanders*, 372 U.S. 368 (1963).

2. *To base Hawaii Legislative apportionment on "total population" would result in the election of a number of legislators in a number of districts with relatively small number of voters per legislator as compared to the number of voters per legislator in other districts.*

The proposed districting system for the City and County of Honolulu, based on census enumeration worked out by the expert Robert Schmitt (Plaintiffs' Ex. 8, R. 252 (unprinted)) graphically illustrates the inequity which will result if apportionment is based on "total population." The island of Oahu will be entitled under this proposal to 20 of the 25 State Senators, and to 40 of the 51 State Representatives (R. 250-51). The largest representative district in terms of "total population" will be that area which includes Schofield Barracks, and it will consist predominately, if not entirely, of military personnel. (R. 251) And, yet, this district in point of registered voters will be the smallest district on the island of Oahu. (R. 251) This means, of course, that a relatively small number of votes will elect a representative from this district, while it will take considerably more votes for the election of representatives in districts with smaller "total population." Indeed, under the proposed districting system based on "total population",, it is entirely possible, for example in the Hickam-Pearl Harbor area, to have a Representative District which would have almost no voters at all. (R. 275)

Thus, the electoral power of the voter who lives in a district with a large number of non-voters will be magnified, and will weight more heavily the vote of the voters residing in those districts than the vote of those residing in districts with a greater number of voters.[43] This is hardly the objective of the one man-one vote principle.

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[43]See Silva, *Making Votes Count: Arguments Advanced for Basing Representation on Electors Turning Out Rather than Population*, 1963 NAT'L. CIVIC REV. 489. The author argues that it is more in keeping with the equal-populations principle to base representation on actual votes cast.

To require then that the Hawaii Legislative apportionment be based on "total population" would be highly unreasonable. Perhaps there is need for an approach which will liberalize the qualification of those in the military service and stationed here in Hawaii to enable more of them to become eligible to participate in the State's electoral process. But, this is not the question now before this Court.[44]

Davis v. Mann, 377 US. 678 (1964), did not hold that in all cases the military *must* be counted in determining the numerical population of the legislative districts. This Court in that case rejected the argument advanced that the Virginia apportionment was valid even though there was underrepresentation in certain areas because the underrepresentation resulted from the fact that those areas contained large numbers of military and military-related personnel. This Court's rejection of the argument was proper, since what was being attempted by the argument was to exclude the military from being counted in determining the districts' populations, when in Virginia, apparently all persons were to be counted in determining population, regardless of age, sex, occupation or otherwise. In such instance, to single out the military for exclusion constituted discrimination which, *without more being shown*, could not be constitutionally sustained, particularly when the policy of the State of Virginia was to foster and encourage voting by the military. This is not the case in Hawaii. By measuring "population"

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[44]Appellant in Case No. 318 suggests that there has been discrimination against the military's right to vote in Hawaii. (GO Br. 65, n. 30) It is suggested that the Hawaii House is now apportioned on the basis of 1958 registered voter, and that the qualifications for voting in the 1958 election were established by the Organic Act of the Territory of Hawaii which prohibited voting by the military in Territorial elections. As found by the District Court, there is nothing in the Hawaii Constitution which per se excludes military personnel from establishing residence in Hawaii and become eligible to vote. (R. 73, 238 F. Supp., at 475) The matter of qualification to

on the "registered voter" basis, all persons, regardless of whether military or civilian, regardless of sex, race, occupation or age are counted in determining population, so long as they are registered to vote. The discrimination, if any, is one based on whether the person is registered to vote or not, and as demonstrated above, there is substantial reasons for the use of the registered voter basis.

There are other features in the *Davis* case to distinguish it from the Hawaii case. In the *Davis* case, there was no showing that the Legislature *in fact* took the military factor into account in allocating legislative representation, and, even if such persons were excluded in determining the populations of the districts, there was still a disparity in population among the districts.

C. There is a direct and reliable relationship between the number of civilian population in Hawaii and the ratio of registered voters to the civilian population is relatively stable.

If it is required that the voter registration figure parallel substantially the population figure of the State in order for the legislative apportionment to be based on the registered voter measure, this test is met in the Hawaii Legislative apportionment case.

The District Court found that the apportionment of the Hawaii Legislature on the basis of total population would produce substantially the same result as apportionment on the basis of registered voters. (R. 74) Thus, the District Court, pointing to Plaintiffs' Exhibit 14, Table 13 (R. 260, 372), stated that as between the total population basis and the registered voter basis, the margin of difference in the

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become a voter is separate and apart from this case and was not before the District Court and is not now before this Court. Any member of the armed forces who qualifies and registers will, of course, be counted among the "registered voters" in determining the "population" of the legislative districts.

allocation of the number of legislators to the present senatorial and representative districts would be at the most two. The Appellant in Case No. 318, however, contends that this is not so and points to Plaintiffs' Exhibit 1 (R. 202, 339), and claims that the Tenth Representative District, for example, would be entitled to eight Representatives on the total population base and only four on the registered voter base.

The difference between Plaintiffs' Exhibit 14, Table 13 (R. 260, 372) and Plaintiffs' Exhibit 1 (R. 202, 339) arises from the fact that Plaintiffs' Exhibit 14 is based on "civilian" population, excluding military personnel (but not necessarily excluding military dependents), whereas Plaintiffs' Exhibit 1 is on the census total population, including all military personnel. As indicated above, it is rational and reasonable that the military who are not, at least, qualified voters be excluded in determining "population" base in the apportionment of Hawaii Legislature. In Plaintiffs' Exhibit 1 (R. 202, 339) the largest discrepancy in the number of legislator is in the Eighth, Ninth, Tenth and Eleventh Representative Districts and the Fourth and Fifth Senatorial Districts, and the reason for this is because these districts have the heaviest, if not the entire, concentration of military personnel stationed in Hawaii. (R. 391)

The finding of the District Court is in accord with the finding of the Constitutional Convention of the State of Hawaii. (R. 347-48) It is important to note that the Constitutional Convention's determination to use the registered voter basis rather than the total population basis was not simply because the convention found, as a practical matter, that the number of registered voters bore a reliable and fairly uniform relationship to total population, but also because the convention found that it was difficult to obtain citizen

population figure or total population figure which was broken down into desirable districts. While apportionment on the basis of "eligible" rather than actually "registered voters" may be desirable, these figures are not readily available and it would be extremely difficult at the present time to secure reliable figures for the military and military dependents. (R. 74, 221) Until such time that the Census Bureau can furnish the necessary data to enable a fairly reliable count of the "eligible voters," for the reasons stated above, it appears that the "registered voter" count is not only the best, but perhaps even necessary, in furthering the aim of equality of votes among the voters in Hawaii.

D. The "registered voters" measure does not discriminate against certain segments of the State's population.

Appellant in Case No. 318 contends that the "registered voters" measure of apportionment discriminates invidiously against (1) persons living in areas of low proportions of registration; (2) areas which have in the past received less representation than that to which they were entitled: (3) the poor and the communities in which they live; (4) the illiterate and the areas in which they live; (5) areas with a low median population age; and (6) the military and the areas in which they live. (GO Br. 56-67)

In the first place, Appellant's claim is, of course, based on the assumption that every person, whether a voter or not, is entitled to representation. This argument has been effectively disposed of in the earlier portions of this brief. (pp. 96 to 100, *supra.*)

In the second place, there is nothing in the record to substantiate Appellant's claim. The Appellant relies heavily on what he claims is the low voter registration figure for all those persons he mentioned as being invidiously discriminated against. The argument is that because they don't vote,

and thus because they are not counted in determining the "population" base, they are effectively left out of the process of representative government.

The District Court found that more than 87% of those eligible to vote in Hawaii were registered to vote in 1960. (R. 74, 238 F. Supp., at 475-76) (See Plaintiffs' Ex. 14, Table 5, R. 260, 364) The percentage figures used by Appellant are misleading.

1. It is claimed that the island of Oahu, which has been the most underrepresented island in Hawaii, giving rise to this case, has the lowest voter registration figure. It is claimed that only 51.6% of those 20 and over were registered to vote in 1960. But the figure 51.6% includes those who were *not eligible* to vote, by reason of military service, incompetents, alienage, etc. (R. 263-64) With the military and the bulk of the State's ill population and centers for institutional care being concentrated on the island of Oahu, is there any wonder that there were more of them included for Oahu in counting those 20 years and over, than for the other islands? The same table shows that of the *eligibles* on Oahu, 82.8% were registered to vote in 1960—close to that average of 87.1 for the entire State. (R. 364)

2. The voter registration figure for the poor and the communities in which they live is taken from Plaintiffs' Ex. 14, Table 6 (R. 260, 365). The figures on Table 6 are again misleading, for there is lack of explanation anywhere in the record as to exactly who is included within each median income level.

3. The allegation with respect to illiteracy is entirely without evidential support. There is nothing in the record to indicate the number of illiterates in the State and the

places within the State where they may be concentrated. The argument that illiterates are likely to congregate in specific geographic areas is without foundation. The District Court expressly found Hawaii to have an unusually literate citizenry. (R. 74, 238 F. Supp., at 476)

4. The arguments with respect to areas of low median population age and the military are speculative and without foundation. Is there really any factual foundation to the assertion that those with a larger number of children have the greatest need? The needs of the State and the relative importance of needs are matters of legislative judgment. Then, too, to assume that, because there are greater number of children in one district than another, the Legislature will take special consideration to meet the needs of that district is indulging in a great deal of assumption.

With respect to the military, as observed earlier, the question of the qualification of the military to vote is not before this Court. Voter registration procedure, it has been stated earlier in this brief, is indeed one aspect or facet of "representative government," and one of the ways in which representative government can be made more meaningful. But, there is nothing in the record in this case to indicate that there has been any voter discrimination because of military service, nor has this point been pressed in the District Court below.

IX. THE USE OF THE MULTI-MEMBER DISTRICTING SYSTEM FOR THE HOUSE OF REPRESENTATIVES DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

The major portion of this brief has been devoted to a showing that the proposed reapportionment of the Senate is constitutionally acceptable. Much of the arguments pressed

in favor of the validity of the Senate plan is applicable to the apportionment of the Hawaii House of Representatives. The language used in demonstrating the validity of the Senate plan has been at times broad enough to cover the apportionment of the House. In this part of the brief, however, the specific subject of concentration is the objections raised by Appellant in No. 318 to the apportionment of the House among multi-member districts.

This Court, in reviewing the validity of the proposed Senate Reapportionment Plan, must, indeed, review the apportionment of the House to determine whether the apportionment of the House has any inequities which are aggravated by the Senate Reapportionment Plan as to cast constitutional suspicion upon the apportionment of the entire Hawaii Legislature. *Maryland Committee v. Tawes*, 377 U.S. 656 (1964), *Lucas v. Forty-Fourth General Assembly of Colorado*, 377 U.S. 713 (1964).

This part of the brief will demonstrate that the apportionment of the House of Representatives under Article III, Sections 3 and 4 of the Hawaii Constitution contains no disparities from the principle of equal-populations and that there has been no showing that the apportionment of the House otherwise contains inequities as to weight the votes of voters in one district any more than the votes of voters in other districts. In other parts of this brief, it has been demonstrated that the proposed reapportionment of the Senate contains no such inequities and that when the Legislature is viewed as a whole, it cannot be said that substantial inequities exist by reason of the reapportionment of the Senate as to render the resulting apportionment of the entire Legislature invalid under the Equal Protection Clause.[45]

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[45]See pp. 85 to 89, *supra*.

A. The employment of multi-member districts for the House is grounded upon public policy considerations and judgmental decision made upon existing state of facts.

The selection of multi-member districts for the Senate was influenced by public policy determination made by the Hawaii Legislature that it would be in the interest of the State to foster the election of legislators oriented toward state-wide, rather than local, problems. The Legislature also took into account those relevant factors which are parts and parcels of any system of representative government.

The reasons for the creation of multi-member districts in the apportionment of the Hawaii House of Representatives are not clearly articulated in the proceedings of the Hawaii Constitutional Convention of 1950. Yet, a perusal of the proceedings affords some basis for concluding that the Constitutional Convention did indeed consider the relative merits of the single-member districting system versus the multi-member districting system. Thus, Standing Committee Report No. 92 in the Proceedings of the Hawaii Constitutional Convention states,

> "The proposal embodies what your Committee believes necessary or desirable in establishing the legislative department of the state government. Before arriving at its proposal your Committee studied the several proposals referred to it, as well as those provisions of the Hawaiian Organic Act, the Model State Constitution and the constitutions of several of the states pertaining to the legislature. Your Committee has decided to retain the framework provided in the Organic Act without substantial change, except in a few particulars." (R. 343)

Standing Committee Report No. 92 further suggests as a probable reason for the multi-member districts in the

House, its judgmental decision that the "present representation enjoyed by the neighbor islands should not, at least for the present time, be decreased." (R. 348) Under the provisions of the Hawaiian Organic Act in effect at the time of the Constitutional Convention, the House of Representatives was composed of 30 members, 18 of whom represented the neighbor islands and 12 of whom represented the island of Oahu. In its concern to structure the House of Representatives on the equal-populations principle, and yet retain the then representation enjoyed by the neighbor islands, the members of the Constitutional Convention resolved the House representational problem by increasing the number of representatives from the island of Oahu from 12 to 33. (R. 348)

Whatever the policy and judgmental decisions leading to the creation of multi-member districts in the Hawaii House of Representatives, it would appear, in line with the Equal Protection cases of this Court, that, unless it is patent on its face that the discrimination is based on race, sex or homesite, or unless it appears from the apportionment itself that there is substantial deviation from the equal-populations principle, if there is any state of facts which can justify the plan, it must be presumed that the members of the Hawaii Constitutional Convention devised that plan upon those state of facts. *McGowen v. Maryland*, 366 U.S. 420 (1961); *Morey v. Doud*, 354 U.S. 457 (1957).

As indicated with respect to the Senate Reapportionment Plan, there are any number of valid justifications, if justifications are needed, for the creation of multi-member districts. It is reasonable to assume that the Delegates to the Hawaii Constitutional Convention acted on substantially the same state of facts which prompted the Hawaii Legislature to create multi-member districts for the State Senate.

B. The employment of multi-member districts in the House of Representatives has not been demonstrated to result in any invidious discrimination.

1. The construction of multi-member Representative Districts was not arbitrary, or, at least, it was not shown to be arbitrary.

The present apportionment of the House of Representatives is based on the measure of registered voters. The last reapportionment of the House in 1959 was based on the 1958 voter registration. As thus reapportioned, the total number of Representatives is apportioned among the districts in compliance with the principle of equal proportions. (R. 65, 238 F. Supp., at 471) Thus, on its face, it cannot be said that the weight of the vote of a voter in one district is less than the weight of the votes of voters in other districts. Those districts which elect two times as many Representatives as a single-member district have two times as many registered voters in their districts as the single-member district.

Further, the representative district lines, as in the case of the proposed senatorial district lines, follow substantially historical, geographical and governmental lines and adhere to the principle of compactness and contiguity. While the representative district lines may not be as desirable as the proposed senatorial district lines (R. 325), nonetheless, unless it can be demonstrated that the representative district lines are invidious, their validity must be presumed. The District Court below did not find that the representative district lines were in any manner arbitrary or lacking in rationality.

Adherence to established geographical lines and the principle of compactness and contiguity, when coupled with the apportionment of the total number of Representatives on

the method of equal proportions, without more, cannot be said to discriminate against any voter invidiously, if at all. Geographical lines, compactness and contiguity and equal-populations, together with the "freezing" of the number of Representatives and the representative district lines enable the decennial reapportionment to take place with the fears of partisan gerrymandering reduced to its minimum.

2. There has been no showing that the multi-member districts of the House, by themselves, or in conjunction with the proposed multi-member districts of the Senate over-represent the larger multi-member districts or submerge the minorities in multi-member districts or denigrate majority rule.

As shown with respect to the senatorial districting plan, the fears expressed by the District Court and by Appellants in No. 318 are speculative at best. Overrepresentation, submergence of minorities and denigration of majority rule can occur in either single-member districts or multi-member districts.[46] These are, indeed, problems which occur in any system of representative government, and there is much need for constant vigilance on the part of the body politic, in the exercise of its political and policy judgment, to insure maximum opportunity for achieving fair and effective representation for all. But, the apportionment of the Legislature is not the sole guarantee of fair and effective representation. Much judgmental decisions are required in the structuring and employment of various factors and facets of government to achieve the ultimate in representative government.

Appellant complains that because of the *size* of one of the eighteen House districts, that district with six Representa-

[46]See pp. 54 to 62, *supra* and note 21, p. 62. *supra.*

tives, controls 12% of the House. If it does, it does so simply because it contains 12% of the registered voter population in the State. There is nothing invidious about this any more than an at-large district containing 100% of the population theoretically having 100% control. And, this Court has intimated that at-large elections are not prohibited by the Equal Protection Clause. *Lucas v. Forty-Fourth General Assembly of Colorado*, 377 U.S. 713, 731, note 21 (1964). Even to assume that the six Representatives will control 12% of the House is to assume too much. It assumes that all six of them are of the same party or are all in the majority or otherwise vote together on all measures. This is an unlikely assumption. This Court held in *Fortson v. Dorsey*, 379 U.S. 433 (1964), that simply because a multi-member district is large, without more, cannot be said to be constitutionally defective, so long as the district contains its proportionate share of the populace to justify the number of legislators assigned to that district.

That the multi-member districting system in the House submerges minorities is, indeed, as Appellant admits (GO Br. 81), without proof in the District Court below. The arguments advanced to show that minorities are submerged are the traditional ones, which, as pointed out earlier in this brief, have never really been proven. The potential submergence of minorities occurs in any system of districting. Any system of districting, no matter how carefully or carelessly the district lines are drawn, will work to the advantage of some group and to the disadvantage of others.[47] The difficulty is in pin-pointing the groups which have been advantaged and which groups have been submerged in a given system of districting, and proof along this line is lacking in the records of this case.

That multi-member districting system of the House sub-

[47]See note 20, pp 61-62, *supra*.

verts majority rule, as in the case of the proposed reapportionment of the Senate, is devoid of facts. Neither single-member districting system nor multi-member districting system insures absolute majority rule.[48]

CONCLUSION

For the reasons stated, the decision and order of the District Court dated April 28, 1965, should be reversed and the proposed Senate Reapportionment and the apportionment of the House of Representatives should both be upheld as comporting with the requirements of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

If, for any reason, either or both of the proposed reapportionment of the Senate and the apportionment of the House be held by this Court as not comporting with the requirements of the Equal Protection Clause;

(a) the decision and order of the District Court dated April 28, 1965, should be reversed insofar as it requires that one house, at least, of the Hawaii Legislature be apportioned on single-member districts, the legislative districts be homogeneous in their ethnic, socio-economic, racial, industrial and occupational complexion and no legislative district of either house have identical boundaries as a district of the other house; and

(b) paragraphs 3 and 4 of the decision and order of February 17, 1965, should be reversed.

Respectfully submitted,
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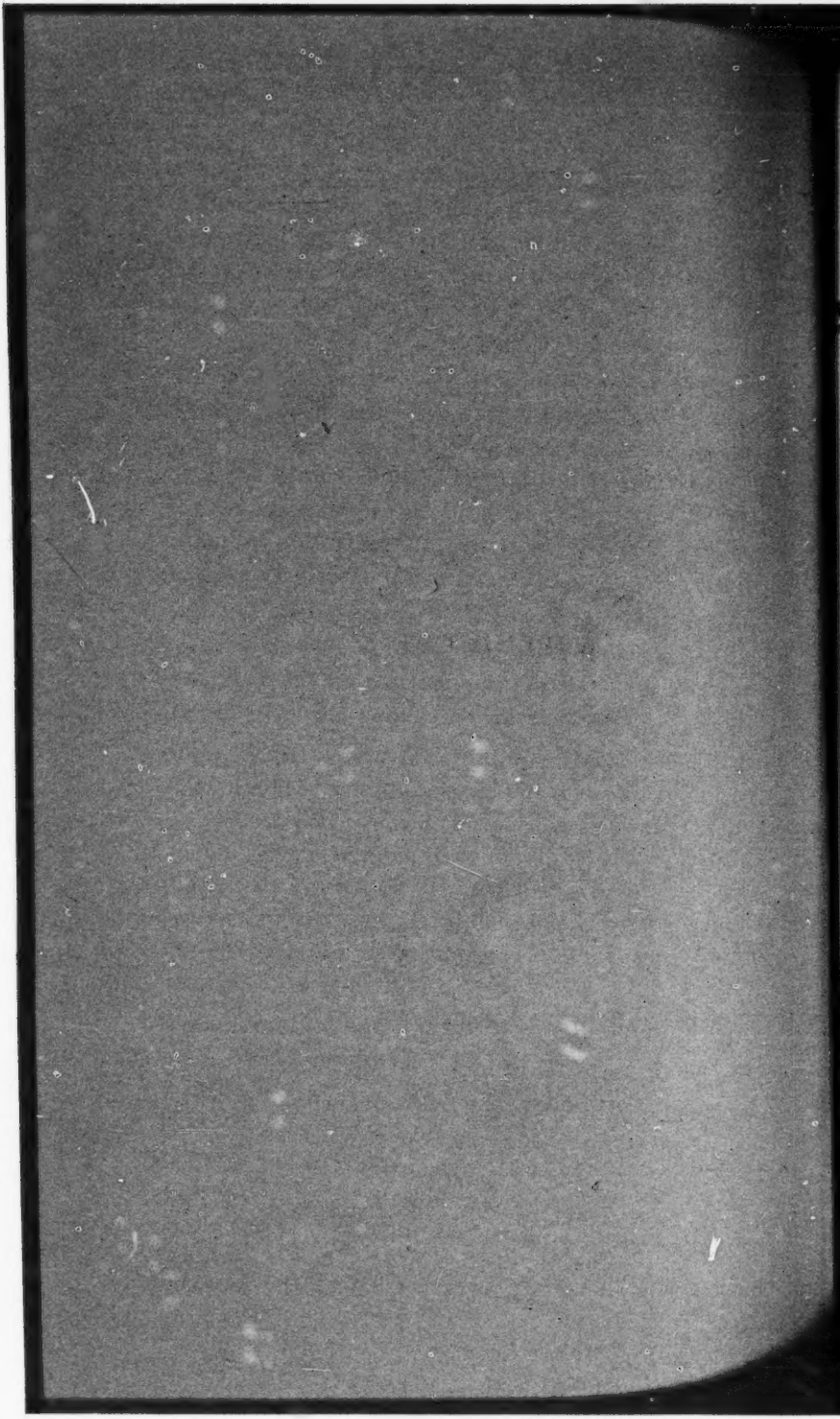
[48]See note 21, p. 62, *supra*.

APPENDICES



APPENDIX A

Constitutional and Statutory Provisions

1. Amendment XIV, Section 1, Constitution of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Article III, Sections 1, 2, 3, 4 and 5, Constitution of the State of Hawaii.

ARTICLE III

THE LEGISLATURE

Legislative Power

SECTION 1. The legislative power of the State shall be vested in a legislature, which shall consist of two houses, a senate and a house of representatives. Such power shall extend to all rightful subjects of legislation not inconsistent with this constitution or the Constitution of the United States.

Senate; Districts; Composition

SECTION 2. The senate shall be composed of twenty-five members, who shall be elected by the qualified voters of the respective senatorial districts. The districts, and the number of senators to be elected from each, shall be as follows:

First senatorial district: that portion of the island of Hawaii known as Puna, Hilo and Hamakua, five;

Second senatorial district: that portion of the island of Hawaii known as Kau, Kona and Kohala, two;

Third senatorial district: the islands of Maui, Molokai, Lanai and Kahoolawe, five;

Fourth senatorial district: that portion of the island of Oahu lying east and south of Nuuanu Street and Pali Road and the upper ridge of the Koolau Range from the Nuuanu Pali to Makapuu Point and all other islands not specifically enumerated, five;

Fifth senatorial district: that portion of the island of Oahu lying west and north of the fourth senatorial district, five; and

Sixth senatorial district: the islands of Kauai and Niihau, three.

House of Representatives; Composition

SECTION 3. The house of representatives shall be composed of fifty-one members, who shall be elected by the qualified voters of the respective representative districts. Until the next reapportionment, the representative districts and the number of representatives to be elected from each shall be as set forth in the Schedule.

Reapportionment of House

SECTION 4. On or before June 1 of the year 1959, and of each tenth year thereafter, the governor shall reapportion the members of the house of representativs in the following manner: The total number of representatives shall first be reapportioned among four basic areas, namely, (1) the island of Hawaii, (2) the islands of Maui, Molokai,

Lanai and Kahoolawe, (3) the island of Oahu and all other islands not specifically enumerated, and (4) the islands of Kauai and Niihau, on the basis of the number of voters registered at the last preceding general election in each of such basic areas and computed by the method known as the method of equal proportions, no basic area to receive less than one member. Upon the determination of the total number of representatives to which each basic area is entitled, such total shall be reapportioned among the one or more representative districts within each basic area on the basis of the number of voters registered at the last preceding general election within each of such representative districts and computed by the method known as the method of equal proportions, no representative district to receive less than one member. Upon any reapportionment, should the total number of voters registered in any representative district be less than one-half of the quotient obtained by dividing the total number of voters registered in the State by the total number of members to which the house is entitled, then, as part of such reapportionment, the basic area within which such representative district lies shall be redistricted by the governor in such manner that the total number of voters registered in each new representative district therein shall be more than one-half of such quotient.

The governor shall thereupon issue a proclamation showing the results of such reapportionment, and such reapportionment shall be effective for the election of members to such house for the next five succeeding legislatures.

Mandamus

Original jurisdiction is hereby vested in the supreme court of the State to be exercised on the application of any registered voter, made within thirty days following the date specified above, to compel, by mandamus or otherwise, the

governor to perform the above duty; and made within thirty days following the date of such proclamation, to compel, by mandamus or otherwise, the correction of any error made in such reapportionment.

Election of Members; Term

SECTION 5. The members of the legislature shall be elected at general elections. The term of office of members of the house of representatives shall be two years beginning with their election and ending on the day of the next general election, and the term of office of members of the senate shall be four years beginning with their election and ending on the day of the second general election after their election.

3. Article XVI, Section 1, Constitution of the State of Hawaii.

ARTICLE XVI

SCHEDULE

REPRESENTATIVE DISTRICTS

Description; Number of Members

SECTION 1. As provided in Section 3 of Article III until the next reapportionment, the representative districts and the number of members to be elected from each shall be as follows:

First representative district: that portion of the island of of Hawaii known as Puna, one representative;

Second representative district: that portion of the island of Hawaii known as South Hilo, four representatives;

Third representative district: that portion of the island of Hawaii known as North Hilo and Hamakua, one representative;

Fourth representative district: that portion of the island of Hawaii known as Kau and South Kona and that portion of North Kona, for convenience herein referred to as Keauhou, more particularly described as follows: from a point at the seashore between the lands of Holualoa 1 and 2 and Puapuaa 2 running northeasterly along the boundary of Holualoa 1 and 2 to Puu Laalaau; (2) easterly in a straight line to a point called "Naohueleelua" being the common corner of the lands of Puuanahulu, Kaohe and Keauhou 2nd; (3) southeasterly along the common boundary between Hamakua and North Kona districts to the summit of Mauna Loa; (4) westerly along the common boundary between Kau and North Kona districts to the easterly boundary of South Kona district; (5) northerly and westerly along the boundary between North and South Kona district to the seashore; and (6) northerly along the seashore to the point of beginning, one representative;

Fifth representative district: that portion of the island of Hawaii known as Kohala and that portion of North Kona not included in the fourth representative district, one representative;

Sixth representative district: the islands of Molokai and Lanai, one representative;

Seventh representative district: the islands of Maui and Kahoolawe, five representatives;

Eighth representative district: that portion of the island of Oahu known as Koolaupoko and Koolauloa, two representatives;

Ninth representative district: that portion of the island of Oahu, for convenience herein referred to as Waialua and Wahiawa and a portion of Ewa known as Kunia and Waipio, more particularly described as follows:

Beginning at the seashore on the boundary between the Ahupuaas of Waimea and Pupukea and following along the North boundary of the Ahupuaa of Waimea to Puu Kainapuaa on the Koolau Range at the junction of the Ahupuaas of Laie, Waimea and Kawailoa, thence southeasterly along the top of the Koolau Range, passing over Puu Pauao and Puu Kaaumakua to the head of Kipapa Gulch, thence down along Kipapa Gulch in all its turnings and windings to Waiahole Ditch, thence southwesterly along Waiahole Ditch in all its turnings and windings to Reservoir No. 31 of the Oahu Sugar Company, thence following a direct line to Puu Palikea on the Waianae Mountain Range, thence northwesterly following along the top of Waianae Mountain Range, passing over Puu Kaua, Puu Kanehoa, Puu Hapapa, Puu Kumakalii, Puu Kalena, Puu Kaala to Puu Pueo, thence westerly along the boundary between the Ahupuaas of Kaena and Keawaula to the seashore at Kaena Point, thence easterly along the seashore to the point of beginning, two representatives;

Tenth representative district: that portion of the island of Oahu, for convenience herein referred to as Ewa, (excluding Kunia and Waipio) and Waianae, more particularly described as follows:

Beginning at the seashore at Kaena Point, on the boundary between the Ahupuaas of Kaena and Keawaula, and following along said boundary to Puu Pueo on the Waianae Mountain Range, thence southeasterly along the top of the Waianae Mountain Range, passing over Puu Kaala, Puu Kalena, Puu Kumakalii, Puu Hapapa, Puu Kanehoa, Puu Kaua to Puu Palikea, thence following a direct line to Reservoir No. 31 of the Oahu Sugar Company, thence northeasterly along the Waiahole Ditch in all its turnings and windings to Kipapa Gulch, thence up along Kipapa Gulch in all its turnings and windings to the top of the

Koolau Range, thence southeasterly along the top of the Koolau Range to the boundary between the Ahupuaas of Halawa and Moanalua, thence southwesterly along the boundary between the Ahupuaas of Halawa and Moanalua to the seashore, thence westerly along the seashore to the point of beginning, four representatives;

Eleventh representative district: that portion of the island of Oahu, for convenience herein referred to as Kalihi, more particularly described as follows: from the intersection of Kalihi and Auiki Streets running westerly along Auiki Street to Mokauea Street; (2) southwesterly along Mokauea Street Extension extended to a point on the outer edge of the reef; (3) westerly along the outer edge of the reef to a point on the Moanalua-Halawa boundary; (4) northerly and northeasterly along the Moanalua-Halawa boundary to the top of Koolau Range; (5) southeasterly along the top of Koolau Range to a place called "Puu Lanihuli"; (6) southwesterly along the top of the ridge between the lands of Kalihi, Kapalama and Nuuanu to Kalihi Street; and (7) southwesterly along Kalihi Street to the point of beginning, three representatives;

Twelfth representative district: that portion of the island of Oahu, for convenience herein referred to as upper Nuuanu, more particularly described as follows: from the intersection of King and Kalihi Streets running northeasterly along Kalihi Street to the ridge between the lands of Kalihi, Kapalama and Nuuanu; (2) northeasterly along the top of said ridge to a point on the Koolau Range called "Puu Lanihuli"; (3) easterly along the top of said Range to Pali Road at the Nuuanu Pali; (4) southwesterly along Pali Road to Nuuanu Avenue and southwesterly along Nuuanu Avenue to School Street; (5) northwesterly along School Street to the center line of the Kapalama Drainage Canal (Waikiki Branch); (6) southwesterly along said canal to the center

line of the main Kapalama Drainage Canal; (7) southwesterly along said Canal to King Street; and (8) northwesterly along King Street to the point of beginning, three representatives;

Thirteenth representative district: that portion of the island of Oahu, for convenience herein referred to as Kapalama, more particularly described as follows: from the junction of the Honolulu Harbor Channel and the reef running westerly along the outer edge of the reef to Mokauea Street Extension extended; (2) northeasterly along Mokauea Street Extension extended to Sand Island Road; (3) northeasterly along Mokauea Street Extension to Auiki Street; (4) easterly along Auiki Street to Kalihi Street; (5) northeasterly along Kalihi Street to King Street; (6) southeasterly along King Street to the center line of the main Kapalama Drainage Canal; (7) northerly along said Canal to the center line of the Kapalama Drainage Canal (Waikiki Branch); (8) northeasterly along said Canal to School Street; (9) southeasterly along School Street to Nuuanu Avenue; (10) southwesterly along Nuuanu Avenue to the sea; and (11) southwesterly along the middle of Honolulu Harbor and Honolulu Harbor Channel to the point of beginning, three representatives;

Fourteenth representative district: that portion of the island of Oahu for convenience herein referred to as Pauoa, more particularly described as follows: from the junction of the Honolulu Harbor Channel and the outer edge of the reef running northeasterly along the middle of Honolulu Harbor Channel and Honolulu Harbor to the intersection of Queen Street and Nuuanu Avenue; (2) northeasterly along Nuuanu Avenue to Pali Road and northeasterly along Pali Road to the top of the Koolau Range at the Nuuanu Pali; (3) easterly and southerly along the top of the Koolau Range to a point called "Puu Konahuanui"; (4) southwest-

erly along the top of the ridge between the lands of Nuuanu, Pauoa and Manoa to a mountain peak called "Puu Ohia" or "Tantalus"; (5) southwesterly along the top of the ridge between the lands of Makiki and Kalawahine to the intersection of Nehoa Street and Lewalani Drive; (6) southerly along Lewalani Drive and Piikoi Street to Wilder Avenue; (7) easterly along Wilder Avenue to Punahou Street; (8) southerly along Punahou Street to King Street; (9) westerly along King Street to Kalakaua Avenue; (10) southerly along Kalakaua Avenue to the center line of the Ala Wai Canal; (11) westerly along said Canal and along the line of said Canal extended to the outer edge of the reef; and (12) westerly along the outer edge of the reef to the point of beginning, five representatives;

Fifteenth representative district: that portion of the island of Oahu, for convenience herein referred to as Manoa and Waikiki, more particularly described as follows: from the intersection of Kalakaua Avenue and the center line of the Ala Wai Canal running northerly along Kalakaua Avenue to King Street; (2) easterly along King Street to Punahou Street; (3) northerly along Punahou Street to Wilder Avenue; (4) westerly along Wilder Avenue to Piikoi Street; (5) northerly along Piikoi Street to Lewalani Drive; (6) northerly along Lewalani Drive to Nehoa Street; (7) northeasterly along the top of the ridge between the lands of Makiki and Kalawahine to a mountain peak called "Puu Ohia" or "Tantalus"; (8) northeasterly along the top of the ridge between the lands of Pauoa, Manoa and Nuuanu to a point on the Koolau Range called "Puu Konahuanui"; (9) southeasterly along the top of said Range to a place called "Mt. Olympus"; (10) southwesterly along the top of Waahila Ridge to the top edge of Palolo Valley; (11) southwesterly along the top edge of said Valley to the forest reserve boundary; (12) southwesterly

along the southeasterly boundary of St. Louis Heights Tract, Series 2 (File Plan 464) to the southerly boundary of said Tract 100 feet southeasterly from Alencastre Street; (13) southwesterly parallel to and 100 feet from Alencastre Street and St. Louis Drive to Waialae Avenue; (14) westerly along Waialae Avenue to Kapahulu Avenue extended; (15) southerly across Waialae Avenue and along Kapahulu Avenue to Kalakaua Avenue; (16) westerly along Kapahulu Avenue extended to the outer edge of the reef; (17) northwesterly along the outer edge of the reef to a point on the line extended of the center line of the Ala Wai Canal; and (18) easterly along said line to the point of beginning, six representatives;

Sixteenth representative district: that portion of the island of Oahu, for convenience herein referred to as Kaimuki and Kapahulu, more particularly described as follows: from a point at the seacoast at a place called "Black Point" running westerly along the seacoast to Kapahulu Avenue extended to the sea; (2) easterly across Kalakaua Avenue and easterly and northerly along Kapahulu Avenue to Waialae Avenue; (3) easterly along Waialae Avenue to a point 100 feet easterly of St. Louis Drive; (4) northeasterly across Waialae Avenue then parallel to and 100 feet from St. Louis Drive and Alencastre Street to the southerly boundary of St. Louis Heights Tract, Series 2 (File Plan No. 464); (5) northeasterly along the southeasterly boundary of said Tract to the forest reserve boundary; (6) northeasterly along the top ridge of Palolo Valley to the top of Waahila Ridge; (7) northeasterly along the top of Waahila Ridge to a point on the Koolau Range called "Mt. Olympus"; (8) easterly along the top of the Koolau Range to the top of the ridge between the lands of Waialae Nui and Palolo; (9) southwesterly along the top of said ridge to a place called "Kalepeamoa"; (10) southwesterly along Mauumae

Ridge to Sierra Drive; (11) southwesterly along Sierra Drive to Waialae Avenue; (12) easterly along Waialae Avenue to 13th Avenue; (13) southwesterly along 13th Avenue and Ocean View Drive to Kilauea Avenue; (14) westerly along Kilauea Avenue to Makapuu Avenue; (15) southwesterly along Makapuu Avenue to Diamond Head Road; and (16) southeasterly along Diamond Head Road to the Military Road and along the Military Road extended to the point of beginning, four representatives;

Seventeenth representative district: that portion of the island of Oahu not included in any other representative district on the island of Oahu together with all other islands not included in any other representative district, three representatives;

Eighteenth representative district: the islands of Kauai and Niihau, four representatives.

Wherever a roadway, or the intersection of one or more roadways, is designated as a boundary in any of the above descriptions, the center line of such roadway or intersection is intended as such boundary.

4. Article XV, Constitution of the State of Hawaii.

ARTICLE XV

REVISION AND AMENDMENT

Methods of Proposal

SECTION 1. Revisions of or amendments to this constitution may be proposed by constitutional convention or by the legislature.

Constitutional Convention

SECTION 2. The legislature may submit to the electorate at any general or special election the question, "Shall there be a convention to propose a revision of or amendments

to the Constitution?" If any ten-year period shall elapse during which the question shall not have been submitted, the lieutenant governor shall certify the question, to be voted on at the first general election following the expiration of such period.

Election of Delegates

If a majority of the ballots cast upon such question be in the affirmative, delegates to the convention shall be chosen at the next regular election unless the legislature shall provide for the election of delegates at a special election.

Notwithstanding any provision in this constitution to the contrary, other than Section 3 of Article XIV, any qualified voter of the district concerned shall be eligible to membership in the convention.

Unless the legislature shall otherwise provide, there shall be the same number of delegates to such convention, who shall be elected from the same areas, and the convention shall be convened in the same manner, as nearly as practicable, as required for the Hawaii State Constitutional Convention of 1950.

Organization; Procedure

The convention shall determine its own organization and rules of procedure. It shall be the sole judge of the elections, returns and qualifications of its members and, by a two-thirds vote, may suspend or remove any member for cause. The governor shall fill any vacancy by appointment of a qualified voter from the district concerned.

Ratification; Appropriations

The convention shall provide for the time and manner in which the proposed constitutional revision or amend-

ments shall be submitted to a vote of the electorate, but no such revision or amendments shall be effective unless approved at a general election by a majority of all of the votes tallied upon the question, such majority constituting at least thirty-five percent of the total vote cast at such election, or at a special election by a majority of the total vote tallied upon such question, such majority constituting at least thirty-five percent of the total number of registered voters; provided, that no constitutional amendment altering this proviso or the representation from any senatorial district in the senate shall become effective unless it shall also be approved by a majority of the votes tallied upon the question in each of a majority of the counties.

The provisions of this section shall be self-executing, but the legislature shall make the necessary appropriations and may enact legislation to facilitate their operation.

Amendments Proposed by Legislature

SECTION 3. The legislature may propose amendments to the constitution by adopting the same, in the manner required for legislation, by a two-thirds vote of each house on final reading at any session, after either or both houses shall have given the governor at least ten days' written notice of the final form of the proposed amendment, or, with or without such notice, by a majority vote of each house on final reading at each of two successive sessions.

Upon such adoption, the proposed amendments shall be entered upon the journals, with the ayes and noes, and published once in each of four successive weeks in at least one newspaper of general circulation in each senatorial district wherein such a newspaper is published, within the two months' period immediately preceding the next general election.

At such general election the proposed amendments shall be submitted to the electorate for approval or rejection upon a separate ballot.

The conditions of and requirements for ratification of such proposed amendments shall be the same as provided in Section 2 of this article for ratification at a general election.

Veto

SECTION 4. No proposal for amendment of the constitution adopted in either manner provided by this article shall be subject to veto by the governor.

5. Act 281, Session Laws of Hawaii, Regular Session 1965, Vol. 1 (H.B. 987)

A BILL FOR AN ACT

PROVIDING FOR THE PROVISIONAL REAPPORTIONMENT OF THE SENATE OF THE STATE OF HAWAII.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

SECTION 1. *Senate; Districts; Composition.* The Senate shall be composed of twenty-five members, who shall be elected by the qualified voters of the respective senatorial districts. Until the next reapportionment, the senatorial districts, and the number of senators to be elected from each, shall be as follows:

"Senate; Districts; Composition

Section 2. The Senate shall be composed of twenty-five members, who shall be elected by the qualified voters of the respective senatorial districts. Until the next reapportionment, the senatorial districts, and the number of senators to be elected from each, shall be as follows:

First senatorial district: the island of Hawaii, three;

Second senatorial district: the islands of Maui, Molokai, Lanai and Kahoolawe, two;

Third senatorial district: that portion of the island of Oahu consisting of the eighth representative district as described in the Schedule, Article XVI, Section 1, of the Constitution of the State of Hawaii, as amended, three;

Fourth senatorial district: that portion of the island of Oahu consisting of the ninth and tenth representative districts as described in the said Schedule and the first and the eighth precincts of the eleventh representative district as described in the governor's proclamation issued September 11, 1964, for the 1964 general election, four;

Fifth senatorial district: that portion of the island of Oahu consisting of the twelfth and thirteenth representative districts as described in the said Schedule and the second through seventh precincts, inclusive, and the ninth through twelfth precincts, inclusive, of the eleventh representative district, and the first through fifth precincts, inclusive, and the eighth, eleventh, fifteenth and sixteenth precincts of the fourteenth representative district as described in the said proclamation, four;

Sixth senatorial district: that portion of the island of Oahu consisting of the fifteenth representative district as described in the said Schedule and the sixth, seventh, ninth and tenth precincts and the twelfth through fourteenth precincts inclusive, of the fourteenth representative district as described in the said proclamation, four;

Seventh senatorial district: that portion of the island of Oahu consisting of the sixteenth and seventeenth representative districts as described in the said Schedule, four;

Eighth senatorial district: the islands of Kauai and Niihau, one."

SECTION 2. On or before June 1, of the year 1975, and of each tenth year thereafter, the governor shall reapportion the members of the senate in the following manner: The total number of senators shall first be reapportioned among four basic areas, namely, (1) the island of Hawaii, (2) the islands of Maui, Molokai, Lanai and Kahoolawe, (3) the island of Oahu and all other islands not specifically enumerated, and (4) the islands of Kauai and Niihau on the basis of the number of voters registered at the last preceding general election in each of such basic areas and computed by the method known as the method of equal proportions, no basic area to receive less than one member. Upon the determination of the total number of senators to which each basic area is entitled, such total shall be reapportioned among the one or more senatorial districts within each basic area on the basis of the number of voters registered at the last preceding general election within each of such senatorial districts and computed by the method known as the method of equal proportions, no senatorial district to receive less than one member. Upon any reapportionment, should the total number of voters registered in any senatorial district be less than one-half of the quotient obtained by dividing the total number of voters registered in the State by the total number of members to which the senate is entitled, then, as part of such reapportionment, the basic area within which such senatorial district lies shall be redistricted by the governor in such manner that the total number of voters registered in each new senatorial district therein shall be more than one-half of such quotient, provided, however, that there shall be at least one senatorial district in each basic area.

Upon completion of the reapportionment of the senate as provided herein, the governor shall issue a proclamation showing the results thereof.

Except as otherwise provided hereinafter, the initial reapportionment shall be effective for the election of members to the senate in 1976 and shall remain in effect for succeeding senatorial elections until the next reapportionment takes effect. Except as otherwise provided hereinafter, any subsequent reapportionment shall be effective for the election of members to the senate in the year next following such reapportionment and shall remain in effect for succeeding senatorial elections until the next reapportionment takes effect.

An incumbent senator whose term of office does not expire until the second general election following the date of the proclamation, including any such senator whose seat has been apportioned to another district by reapportionment, shall be allowed to complete his four-year term; provided that when the seat of such holdover senator has been reapportioned to another district, the election to fill the new seat in the district to which such seat has been newly apportioned shall not be held until the time of the second election following such proclamation.

Original jurisdiction is hereby vested in the supreme court of the State to be exercised on the application of any registered voter, made within thirty days following the date specified above, to compel, by mandamus or otherwise, the governor to perform the above duty; and made within thirty days following the date of such proclamation, to compel, by mandamus or otherwise, the correction of any error made in such reapportionment.

SECTION 3. The terms of all members of the Senate elected or appointed prior to the general election of 1966 shall terminate on the date of the general election of 1966.

Members of the senate elected at the general election of 1966 shall be divided into two classes.

Members of the first class shall hold office for a term of four years beginning with their election and ending on the day of the second general election held thereafter.

Members of the second class shall hold office for a term of two years beginning with their election and ending on the day of the next general election held thereafter.

Upon the expiration of the aforesaid terms of office of members of the respective classes, the term of office of their successors shall be four years.

Of the members to which each senatorial district is entitled, one-half shall be members of the second class. If the total number of senators to which a senatorial district is entitled is not an even number, the number of members of the first class in such district shall be the quotient of said total number divided by two, rounded off to the next whole number. The remainder shall be members of the second class. Membership in the first and second classes shall be determined by the number of votes cast for each senator in such district. The first class shall consist of those senators, in number corresponding with the number of members of the first class to which such district is entitled, who are elected with the highest number of votes from such district. The remaining senators elected shall constitute the second class.

The senator from a senatorial district that is entitled to one senator shall automatically be a member of the first class.

SECTION 4. This Act shall take effect upon approval by the Governor of the State of Hawaii and by the United States District Court for the District of Hawaii and shall remain in effect until superseded by constitutional amendment; provided that the regular election of 1966, shall be the first election held pursuant to the provisions herein.

APPENDIX B

Memorandum to Judge Pence from Judge Beeks

MEMORANDUM

TO: Judge Pence DATE: March 31, 1965

FROM: Judge Beeks

SUBJECT: *Holt v. Richardson*

I discussed your proposed Decision and Order on Senate Reapportionment Plan of March 18, 1965, and your notes accompanying the same, in a telephone conference with Judge Jertberg on March 29th. Judge Jertberg, because of the fact that he was in Los Angeles without a secretary, asked me to convey to you our joint views, which are as follows:

1. Inasmuch as the Senate Reapportionment Plan of March 18, 1965, is not formally before us, we do not think that any decision and order should be filed because such decision and order would be purely advisory in nature.

2. We believe that the Senate should be redistricted into single senatorial districts, although we may approve two-member districts if and only if the legislature can affirmatively show substantial reasons therefor. There may very well be valid reasons for one or two 2-member districts in the neighboring islands but we perceive no justification whatsoever for other than single member districts on the Island of Oahu, particularly the heavily populated areas thereof.

We have no objection whatsoever to your making our views, as above expressed, informally known to all of the parties but we are opposed to the entry of a written decision and order.

I again discussed this matter with Judge Jertberg, who is now back in Fresno, this morning, read him this memorandum and he signified his approval and concurrence.

It is our suggestion that you discuss the subject matter of this memorandum with counsel for all parties immediately upon receipt of same (I hope you receive it tomorrow) and thereafter arrange a conference call with both of us (Judge Jertberg will be in Fresno) at noon your time on Friday.

cc. Judge Jertberg
Fresno, Calif.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

Nos. 318, 323 and 409

JOHN A. BURNS, Governor of the State of Hawaii,
Appellant,

v.

WILLIAM S. RICHARDSON, *et al., Appellees.*

ELMER F. CRAVALHO, *et al., Appellants,*

v.

WILLIAM S. RICHARDSON, *et al., Appellees.*

KAZUHISA ABE, *et al., Appellants,*

v.

WILLIAM S. RICHARDSON, *et al., Appellees.*

On Appeal From the United States District Court for the District of Hawaii

Brief for William S. Richardson, Lieutenant Governor of the State of Hawaii, Appellee

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Brief for William S. Richardson, Lieutenant Governor of the State of Hawaii, Appellee

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OPINIONS BELOW

The opinion of the District Court dated February 17, 1965, and entered April 9, 1965, is reported at 238 F. Supp. 468, and appears at R. 62-81. Its opinion dated April 28, 1965, is reported at 240 F. Supp. 724 and appears at R. 151-65. In addition, a short unre-

ported opinion of the District Court, dated March 9, 1965, granting a motion to alter or amend the judgment of February 17, 1965, appears at R. 88-91; and an informal memorandum opinion, dated March 31, 1965, is attached as Appendix B, pp. 28a-29a, of the Brief of Appellant John A. Burns.

JURISDICTION

The basis of jurisdiction in the District Court was the Civil Rights Act, 42 U.S.C. §§ 1983, 1988, and 28 U.S.C. § 1343. Pursuant to 28 U.S.C. §§ 2281 and 2284, a three-judge District Court was convened.

The jurisdiction of this Court rests on 28 U.S.C. §§ 1253 and 2101(b). The first of the orders of the District Court from which the appeal is taken was dated February 17, 1965, but was not entered until April 9, 1965 (R. 195); the second was dated and entered on April 28, 1965. (R. 197) The essential portions of the first order had been stayed and reopened by the District Court in response to a timely motion, (R. 88-91) and were not reinstated until April 28, 1965. (R. 164) The notice of appeal in No. 318 was filed on May 3, 1965 (R. 165), and the notices of appeal in Nos. 323 and 409 were filed on May 7, 1965 (R. 180, 184).

STATEMENT OF THE CASE

In summary, the three-judge District Court did the following things about which some or all of the appellants in these consolidated cases complain.

1. Held that registered voters as a base for apportioning the Hawaii legislature was constitutionally permissive. (R. 67-75; 238 F. Supp. at 472-476)

2. Held that the scheme of having representative districts from which different numbers of representatives are elected was constitutionally permissive. (R. 79-80; 238 F. Supp. at 478-479.)

3. Held that the boundaries of the representative districts followed historical, political, geographic and physical lines and that the method of districting was not part of any invidious scheme to disenfranchise any person or group or to dilute the vote of any person. (R. 75, 77; 238 F. Supp. at 476, 477.)

4. Held that the Constitution of the State of Hawaii required any reapportionment of the legislature to be only by constitutional amendment and that the legislature had no power to do so even on an interim or temporary basis. (R. 78; 238 F. Supp. at 478).

5. Adhered to the 1966 general election deadline prescribed by this Court and ordered the legislature to take the necessary action to provide for a constitutional convention, as the only means available under the Constitution of the State of Hawaii to accomplish reapportionment within the prescribed deadline. (R. 78; 238 F. Supp. at 478.)

6. Enjoined the legislature from taking final action on any legislation, except as necessary to organize and provide funds for the legislative session, until all necessary steps to convene a constitutional convention had been provided for by legislative act. (R. 80, 164; 238 F. Supp. at 478-479.)

7. Held that the legislature's proposed plan for reapportioning the senate was unacceptable for adoption by the Court as an interim plan to be used for the election of senators in 1966 and until the State's constitution could be properly amended. (R. 164; 240 F. Supp., 732.)

SUMMARY OF ARGUMENT

The three-judge District Court committed no error and its decision must be affirmed.

1. The United States Constitution protects against having an individual's *vote* for state legislators impaired when the weight of his vote is in a substantial fashion diluted when compared with the weight of votes of citizens living in other parts of the state. There is no constitutional right to vote, nor is there any constitutional right to be represented. There is only constitutional protection of a person's vote. Thus the starting point of any apportionment plan must be the number of *voters* within the several parts of a state. The number of people within these parts, as a base for apportioning members of a state legislative body, is therefore permissible *only* when these numbers of persons will produce an apportionment substantially equivalent to that which the numbers of *voters* would produce.

2. Nothing in the United States Constitution requires single-member legislative districts in either or both houses. To have or not to have multi-member districts is a matter of civic taste to be determined in each state in accordance with the state's own constitutional provisions.

Hawaii's choice of multi-member districts for its house of representatives is not subject to federal constitutional attack.

3. The boundaries of the representative districts in Hawaii were rationally drawn, do not result in the dilution of any person's vote, and do not operate to disenfranchise any person. They meet every constitutional test.

4. A state legislature has power to reapportion itself *only* if that power is granted to it by the constitution of the state. There is no inherent power to do so, no such power can be implied from the broad grant of *legislative* power, and no court, state or federal, has any authority to grant such power if the people of the state have not. The Court below was without error in denying such power, even on a temporary basis, to the Hawaii legislature, the people of Hawaii having reserved such power to themselves.

5. The Court below did not commit error in requiring the legislature to provide the machinery for a constitutional convention to correct the malapportionment of the senate as this was the only constitutional means by which the people of Hawaii could act within the 1966 general election deadline apparently set by this Court. The Court below properly retained jurisdiction of the case so that a reconstituted senate could be elected in 1966 under an apportionment plan ordered by the Court in the event the people of Hawaii were unable to devise a valid plan in time.

6. The lower Court had power to restrain the legislature from taking action on other matters until the Court's order was obeyed. In so far as the 1965 general session of the Hawaii legislature is concerned, this point is moot. In so far as later sessions are concerned, this Court should affirm the existence of such power in the lower Court as the only real way to compel compliance with its order.

7. The lower Court did not abuse its discretion in refusing to order the legislature's apportionment scheme (H.B. 987, R. 113) into effect—*as the Court's plan*—for the 1966 general election. The Court had unquestioned power to fashion its own apportionment

plan for the 1966 general election. It wisely declined, first giving the people of Hawaii the opportunity to do so by constitutional convention and next, deferring to the legislature to propose an interim plan for the Court to adopt. The fact that the Court did not find the legislature's plan acceptable to the Court for adoption as the Court's plan, was not an abuse of discretion.

ARGUMENT

1. REGISTERED VOTERS AS A BASIS FOR APPORTIONMENT IS CONSTITUTIONALLY PERMISSIVE. Nowhere in any decision of this Court is it suggested that a state may not constitutionally limit the right of suffrage so long as such limitation is not based upon race, color, previous condition of servitude or sex. (U.S. Const., Articles XV, XIX.)

Nowhere in the series of 1964 reapportionment cases decided by this Court (*Baker* v. *Carr,* 369 U.S. 186; *Reynolds* v. *Sims,* 377 U.S. 533; *WMCA* v. *Lomenzo,* 377 U.S. 633; *Lucas* v. *The 44th General Assembly of the State of Colorado,* 377 U.S. 713; *The Maryland Committee for Fair Representation* v. *Tawes,* 377 U.S. 595; *Davis* v. *Mann,* 377 U.S. 678; *Roman* v. *Sincock,* 377 U.S. 695) is it even remotely suggested that a state does not have the right, within the constitutional proscription of the 15th and 19th Amendments, to say that children, aliens, felons or transients within a state may not vote in state elections.

In none of these decisions does this refer to the debasement or dilution of anything but a citizen's *vote.*

Indeed, in *Reynolds* v. *Sims,* this Court begins its decision on the merits with the following statement:

> Undeniably the Constitution of the United States protects the right of all *qualified citizens* to vote,

in state as well as in federal elections. A consistent line of decisions by this Court in cases involving attempts to deny or restrict the *right of suffrage* has made this indelibly clear. It has been repeatedly recognized that all *qualified voters* have a constitutionally protected *right to vote,* Ex parte Yarbrough, 110 U.S. 651, and *to have their votes counted,* United States v. Mosely, 238 U.S. 383. In Mosely the Court stated that it is "as equally unquestionable that the *right to have one's vote counted* is as open to protection . . . as the right to put a ballot in a box." 238 U.S., at 386. The *right to vote* can neither be denied outright, Guinn v. United States, 238 U.S. 347, Lane v. Wilson, 307 U.S. 268, nor can it be destroyed by alteration of ballots, see United States v. Classic, 313 U.S. 299, 315, nor diluted by ballot-box stuffing, Ex parte Siebold, 100 U.S. 371, United States v. Saylor, 322 U.S. 385. As the Court stated in Classic, "Obviously included within the right to choose, secured by the Constitution, is *the right of qualified voters* within a State to cast their ballots and have them counted. . . ." 313 U.S., at 315. Racially based gerrymandering, Gomillion v. Lightfoot, 364 U.S., 339, and the conducting of white primaries, Nixon v. Herndon, 273 U.S. 536, Nixon v. Condon, 286 U.S. 73, Smith v. Allwright, 321 U.S. 649, Terry v. Adams, 345 U.S. 461, both of which result in *denying to some citizens their right to vote,* have been held to be constitutionally impermissible. And history has seen a continuing expansion of the scope of the *right of suffrage* in this country. The *right to vote* freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the *right of suffrage* can be denied by a debasement or dilution of the *weight of a citizen's vote* just as effectively as by wholly prohibiting the free exercise of the franchise. (377 U.S. at 554-555; Emphasis added.)

In *Wesberry* v. *Sanders*, 376 U.S. 1, this Court concluded that the constitutional prescription for election of members to the House of Representatives of the Congress of the United States "by the People", construed in its historical context, "means that as nearly as is practicable one man's *vote* in a congressional election is to be worth as much as another's".

This Court also stated that:

> It would defeat the principle solemnly embodied in the Great Compromise—equal representation in the House for equal numbers of people—for us to hold that, within the States, legislatures may draw the lines of congressional districts in such a way as to give some *voters* a greater voice in choosing a Congressman than others. (376 U.S., at 14) (Emphasis added.)

Further, this Court stated that the Constitution's plain objective was that of making equal representation for equal numbers of people the fundamental goal, concluding:

> No right is more precious in a free country than that of having a voice in the election of those who make laws under which, as good citizens, we must live. Other rights, even the most basic are illusory if the *right to vote* is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right. (376 U.S., at 17-18) (Emphasis added.)

Wesberry, said this Court in *Reynolds* v. *Sims*:

> . . . clearly established the fundamental principle of representative government in this country is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a State. Our

> problem, then, is to ascertain, in the instant cases, whether there are any constitutionally cognizable principles which would justify departures from *the basic standard of equality among voters* in the apportionment of seats in state legislatures. (377 U.S. at 560, 561) (Emphasis added.)

In *Reynolds* v. *Sims,* this Court swung back and forth in its use of the terms "population" and "voters", giving no apparent preference to either term:

> We realize that it is a practical impossibility to arrange legislative districts so that each one has an identical number of *residents,* or *citizens,* or *voters.* Mathematical exactness or precision is hardly a workable constitutional requirement. (377 U.S. at 577) (Emphasis added.)

However, it is an inescapable conclusion from the decisions of this Court that it is the *voter* and only the *voter* who has rights that the constitution protects.

It is true, of course, that the word "population" is used frequently in the Court's decisions. It is a word often used to describe a particular population, as, for example, "school population", "inmate population", "hospital population" and "military" or "citizen" population.

It does no violence to any constitutional provision to restrict its meaning in reapportionment matters to "voter population". Indeed, it is the position of the Appellee that such a meaning is the *only* one that can constitutionally be required.

The appellant in No. 318 urges in his brief that what is required by the constitution is an apportionment based upon total population, or *gross* population

and that registered voters as a base is constitutionally permissive *only* when the number of voters happens to be an adequate reflection of total population—

> A "registered voters" measure cannot be upheld in itself; and its products may be upheld only if it happens to be an adequate reflection of total population—and only as long as it is. (Brief, No. 318, p. 43.)

> It [the registered voters measure] could only be sustained on the basis of its correspondence, in result in a particular instance, with a permissible population—based measure. (Brief, No. 138, p. 69.)

We submit that the appellant in No. 318 has missed the mark by a full 180 degrees.

We submit that just the opposite is true: that total population as a basis for apportionment is constitutionally permissive *only* when the use of total population results in an apportionment substantially equivalent to that which the use of registered voters would produce.

Sincock v. *Duffy*, 215 F. Supp. 169 (Delaware), the three-judge District Court reviewed an apportionment plan for Delaware. The basis for apportionment was registered voters. The Court correctly identified the question as one of "debasement of voting rights" (at 172) and stated:

> We take judicial notice of the fact that in the State of Delaware, as in the other States of the United States, there is a direct and stable relationship between the number of inhabitants in a given area and the number of electors therein and that the ratio of electors to inhabitants is relatively stable. We find, therefore, that the number of inhabitants of a given area in the State of Delaware

> reflects with relative accuracy the number of electors in that area, and for the purposes of adjudicating the issues in this case that it is the fact that the number of inhabitants is a relatively accurate indicator of the number of *electors entitled* to be represented in the General Assembly from the area given if representation is to be measured on a population-area basis. (215 F. Supp. at 175-176.)

The arguments advanced by the appellant in No. 318 in support of a population base clearly and undeniably show that a population base *in Hawaii* cannot be used because *in Hawaii* the number of inhabitants is *not* "a relatively accurate indicator of the number of electors entitled to be represented" in the legislature.

As the appellant so carefully demonstrates (see particularly Brief, No. 318, pp. 52-56) substantially different results would be achieved by using total population than by using registered voters. Total population cannot, therefore, be constitutionally valid and the lower Court was without error in requiring, *in Hawaii,* registered voters as the base for new apportionment plans.

In *Buckley* v. *Hoff,* 243 F. Supp. 873 (Vermont) the Court noted:

> It is often argued that the Supreme Court must ultimately condemn the registered voter base in general because of its potential abuse in areas of the country where people are systematically deprived of the right to vote. This argument overlooks the possibility that different rules may apply in different parts of the nation. As the Supreme Court remarked in Reynolds v. Sims, supra, 377 U.S. at 578, 84 S. Ct. at 1390: 'What is marginally permissible in one State may be unsatisfactory in another, depending on the circumstances of the

> case.' In Vermont there is no evidence that anyone has been unjustly denied the franchise in elections to the General Assembly. On the contrary, we note that the 209,225 registered voters constitute 53.7% of the 389,895 residents of the State. Surely this fact demonstrates that registered voters can properly be used as a representative base for legislative apportionment in Vermont. (243 F. Supp. at 876).

Evidence before the lower Court clearly demonstrates that *in Hawaii* every effort is made to encourage voter registration. See particularly the testimony of Eileen K. Lota, (R. 276-286.) and Defendants' Exhibits B and C, (R. 402-406.).

As shown by Plaintiffs' Exhibit 14, Table 5 (R. 364) 56.1% of the total population are registered voters; 87.1% of the total number of persons eligible to vote. (Compare Vermont, where 53.7% of the total population was registered. 243 F. Supp. at 876.)

In Hawaii, there is also an exceptionally high voter participation in elections. In the 1964 general election, 214,694 of the 239,361 registered voters participated, a percentage of 89.7%. (See Intervenors-Plaintiffs' Exhibit GO-4, R. 409, 410 at 410.)

What more rational adherence to the "basic standard of equality among voters" can there be than to apportion seats in Hawaii's legislature *on the basis of voters*!

At the time of the last reapportionment of the House, in 1959, there was a total of 175,317 voters registered in all representative districts for the general election in 1958. With a house of 51 members, the theoretical number of voters that each member should represent

was 3,437, (175,317 ÷ 51). This fact would indicate a range of from 1719 voters to 5155 voters for each representative district because a district having one more than half of the theoretical number of registered voters would be entitled to one representative and a district would not be entitled to a second representative until the registered voter population of the district exceeded the theoretical number by one more than the theoretical number plus one half of such number.

Each one of the eighteen representative districts falls well within that range.

The representative elected from the first representative district, the district having the least registered voters in 1958, represented 2,209 registered voters, 490 more than the minimum theoretically required for one representative.

The six representatives elected from the fifteenth representative district, the district having the most registered voters in 1958, (21,063) each represented 3,510 registered voters, 73 more than the theoretical number each representative should represent.

The three representatives elected from the second representative district, the district having the highest ratio of registered voters to representatives, each represented 4,609 registered voters, 546 less than the maximum theoretically required for one representative.

All other representatives similarly represent a number of registered voters within the permissible extremes, as shown by the following table:

Representative District	1958 Registered Voters	No. of House Members	Ratio of Members to Voters
1	2,209	1	1-2,209
2	13,836	3	1-4,609
3	2,986	1	1-2,986
4	3,862	1	1-3,862
5	2,641	1	1-2,641
6	2,560	1	1-2,560
7	14,195	4	1-3,548
8	13,876	4	1-3,469
9	5,929	2	1-2,964
10	12,926	4	1-3,231
11	10,525	3	1-3,508
12	8,372	3	1-2,791
13	7,621	2	1-3,810
14	14,134	4	1-3,533
15	21,063	6	1-3,510
16	13,746	4	1-3,436
17	13,455	4	1-3,364
18	11,381	3	1-3,797

It is true that different results are obtained for most representative districts when the base used is total, or gross, population. For example, if 1960 gross population is used, voters in a single senatorial district (5th) would elect a majority of senators *and* a majority of representatives. Yet voters *registered* in that district in 1958 represented less than 34% of the voters registered in the State and, in 1962, less than 38% of the voters registered in the State! (See Plaintiffs' Exhibit 1. Representative districts 8, 9, 10, 11, 12 and 13 make up the 5th senatorial district.)

The difference is accounted for by reason of the large military population residing on military bases in the 5th senatorial district.

A recent ruling of the Hawaii State Supreme Court determined that persons residing on military bases in

Hawaii were not eligible to vote because they could not gain the required residency in the State so long as they resided on military bases. In *Re Robinson,* decided October 30, 1964.

In addition, felons in prison are ineligible, as are minors and adults not meeting the residency requirements prescribed for voting.

Voter eligibility in Hawaii depends upon age and residence. The age must be twenty and the residency must be for one year in the State and three months in the district. (Article II, Sections 1 and 3 of the Constitution of the State of Hawaii; Section 11-6 and 11-8, Revised Laws of Hawaii 1955)

The appellant in No. 318 attempts to dismiss the question of standing in his argument that persons and not voters are those protected by the Equal Protection clause. (Brief at p. 45.)

But it is submitted, a transient in military service, an insane person, a child or an unpardoned felon would have no standing to complain about being discriminated against in an apportionment plan simply because he has no right to vote. Appellee repeats: it is the right to vote that is protected, nothing more.

In *Colegrove* v. *Green,* 328 U.S. 549, at 569, this Court stated:

> The constitutionally guaranteed right to vote and the right to have one's vote counted clearly imply the policy that state election systems, no matter what their form, should be designed to give approximately equal weight to each vote cast.

See also *Gomillion* v. *Lightfoot,* 364 U.S. 339 at 346.

In *Baker* v. *Carr,* 369 U.S. 186, Mr. Justice Brennan stated the question presented in these words:

> These appellants seek relief in order to protect or vindicate an interest of their own, and of those similarly situated. Their constitutional claim is, in substance, that the 1901 statute constitutes arbitrary and capricious state action, offensive to the Fourteenth Amendment in its irrational disregard of the standard of apportionment prescribed by the State's Constitution or of any standard, effecting a gross disproportion of representation to *voting population.* The injury which appellants assert is that this classification disfavors the *voters* in the counties in which they reside, placing them in a position of constitutionally unjustifiable inequality vis-a-vis *voters* in irrationally favored counties. A citizen's right to a *vote* free of arbitrary impairment by *state action* has been judicially recognized as a right secured by the Constitution (citing instances and cases.) (Emphasis added.)

The District Court in *Sincock* v. *Duffy,* 215 F. Supp. 169, at 184, referred to this Court's decision in *Baker* v. *Carr,* describing the holding in that case:

> Mr. Justice Brennan stated that one of the jurisdictional questions presented by Baker v. Carr was whether or not the plaintiffs had alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for the illumination of difficult constitutional questions . . . This is the gist of the question of standing. 369 U.S. at 204. The answer given by the Supreme Court was that the plaintiffs had standing to maintain the suit *if their franchise* had been subjected to invidious discrimination and if they had a personal stake in

the outcome of the controversy. *Baker* v. *Carr,* 204-208. (Emphasis supplied.)

In *Pope* v. *Williams,* 193 U.S. 621, a Maryland statute requiring that a person coming into the state to reside should make a declaration of intent a year before he should have the right to be registered as a voter of the state was held by this Court to violate no right protected by the Federal Constitution. Mr. Justice Peckham, speaking for the Court, stated (at 632):

> The privilege to vote in any State is not given by the Federal Constitution, or by any of its amendments. It is not a privilege springing from citizenship of the United States. Mimor v. Hoppersett, 21 Wall. 162, 22 L. Ed. 627. It may not be refused on account of race, color or previous condition of servitude, but it does not follow from mere citizenship of the United States. In other words, the privilege to vote in a state is within the jurisdiction of the state itself, to be exercised as the state may direct, and upon such terms as to it may seem proper, provided, of course, no discrimination is made between individuals, in violation of the Federal Constitution.

This appellee respectfully urges this Court to affirm the lower Court's ruling that in Hawaii a registered voter basis for apportionment is constitutionally permissive.

2. HAWAII'S MULTIMEMBER DISTRICTS VIOLATE NO RIGHT PROTECTED BY THE FEDERAL CONSTITUTION. The question of the validity of multimember districts in a legislative apportionment plan would seem to have been put at rest by *Lucas* v. *The 44th General Assembly of the State of Colorado,* 377 U.S. 713, and, if not by that, by *Fortson* v. *Dorsey,* 379 U.S. 433.

As was said in *WMCA* v. *Lomenzo,* 238 F. Supp. 916, affirmed October 11, 1965, 34 Law Week 31[illegible], No. 85,

> Unlike a fractional district, the extraordinary population of a multimember district is balanced in all respects by its extraordinary number of representatives. (238 F. Supp. at 924.)

Hawaii does not have the extremely long ballot, found by this Court in *Lucas* to be "undesirable". No "long" ballot is found in any district in Hawaii. The highest number of representatives to be elected from any district is in the 15th district on Oahu where six representatives are elected. Even under the current apportionment of the senate, the highest number to be voted for in any election year is three.

This Court's words in *Fortson* v. *Dorsey,* 379 U.S. 433 at 439, are applicable here:

> It might well be that, designedly or otherwise, a multi-member constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population. When this is demonstrated it will be time enough to consider whether the system still passes constitutional muster. This question, however, is not presented by the record before us.
>
> The record thus does not contain any substantiation of the bald assertion in appellees' brief. Since, under these circumstances, this issue has "not been formulated to bring it into focus, and the evidence has not been offered or appraised to decide it, our holding has no bearing on that wholly separate question. *Wright* v. *Rockefeller,* 376 U.S. 52, 58.

There is nothing in the record in these consolidated appeals which demonstrates that the multi-member dis-

tricts in Hawaii "operate to minimize or cancel out the *voting* strength of racial or political elements of the *voting* population".

The appellant in No. 318 is persuaded, in his argument that the multi-member districts in Hawaii are bad, by his own argument that total population must be used. As we have demonstrated, this base, *in Hawaii* is not valid.

The appellant in No. 318 relies, in part, on *Drew* v. *Scranton,* 229 F. Supp. 310, remanded on other grounds, 379 U.S. 40, to show that the multi-member districts in Hawaii violate some constitutional guarantee, and quotes, from that case (Brief, pp. 75-76, footnote 7) as follows:

> In the absence of any legislative history or other explanation justifying it, and we have found none, we can only conclude that this districting is either the result of gerrymandering for partisan advantage, as was suggested at the hearing, or that it was wholly arbitrary and capricious. Id., at 326.

In the first place, that Court was clearly in error in suggesting that there was any constitutional guarantee against "gerrymandering for partisan advantage".

In affirming *WMCA* v. *Lomenzo,* on October 11, 1965, (34 Law Week 3115) Mr. Justice Harlan, concurring in this Court's summary affirmance, stated:

> In WMCA, Inc. v. Lorenzo, 238 F. Supp. 916, the three-judge court found that Plan A satisfied [the order to enact "a valid apportionment scheme"]; in so doing it rejected contentions that apportioning on a basis of citizen population violates the federal constitution, . . . and that partisan 'gerrymandering' may be subject to federal constitutional attack under the Fourteenth Amend-

> ment. In affirming this decision, this Court necessarily affirms these two eminently correct principles.

Judge Waterman, in that case, had said "of course, the ultimate fitness of the scheme for their needs and purposes is for the people of the State of New York, themselves, to decide, and not for this court to mandate". 238 F. Supp. at 927.

Judge Waterman also correctly observed that

> The integration of Democrats and Republicans, or Liberals and Conservatives, has no privileged status under the Federal Constitution. (at 926)

In *Davis* v. *Cameran,* 238 F. Supp. 462, a similar statement was made by District Judge McManus, concurring with the majority on this point:

> So long as a State's system of legislative apportionment meets the test of substantial equality of population among the several legislative districts, to have or not to have multi-member districts is a matter of civic taste to be determined in each State by the political majority in control. (at 468.)

In the second place, as we will show in the next argument, and, as the lower Court found, Hawaii's representative districts "followed along historical, political, geographic and physical lines", and that "[T]here was no gerrymandering in the invidious sense." (238 F. Supp. at 476.)

3. THE BOUNDARIES OF THE REPRESENTATIVE DISTRICTS WERE RATIONALLY DRAWN AND FOLLOWED HISTORICAL, POLITICAL, GEOGRAPHIC AND PHYSICAL LINES. THERE WAS NO ERROR IN THE LOWER COURT'S APPROVAL OF THEM. Hawaii is unique among the several states

in its geographic composition. The state consists of seven inhabited islands, each separated from the other by miles of the Pacific Ocean. These islands, singly or with others, constitute but four counties. The island of Hawaii is the County of Hawaii; the islands of Maui, Molokai and Lanai are grouped together to form the County of Maui; the islands of Kauai and Niihau make up the County of Kauai; and the island of Oahu (together with tiny and largely uninhabited islands not included in any other county) constitutes the City and County of Honolulu.

Each island is different.

As was stated in *Drew* v. *Scranton,* 229 F. Supp. 310, 319:

> But it remains true, we believe, that the bulk of the people of a [Pennsylvania] county have a definite community of interest which they do not share with the people of other counties, even adjoining ones.

In recognition of this diversity of interest which exists among the four counties, the Constitutional Convention delegates drafting Hawaii's constitution deferred to the delegates from each county the determination of the question of legislative districts within their own county.*

The delegates from the County of Kauai, the smallest county in terms of population, chose to have their representatives elected at large and decided against

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* While it is of course true that the convention could take final action only through a majority of its members, the proposals or recommendations made by the delegates from the several counties were accepted by the convention. The entire scheme of apportionment was then approved by the legislature and the voters.

legislative districts. Based upon the number of registered voters at that time, three representatives were apportioned to that county after the initial apportionment of one member to that county was made. Because of a greater increase in registered voters in other counties by 1958, Kauai became entitled to only two additional representatives under the 1959 reapportionment. Again, all three were elected at large.

Maui county delegates determined that the sparsely populated islands of Molokai and Lanai should constitute one district for the county and the island of Maui a second district, without separate legislative districts. The 1950 apportionment gave the district of Molokai and Lanai one representative and the district of Maui, five. All were elected at large in their respective districts.

The relative increase in the number of registered voters in other districts at the time of the 1959 reapportionment decreased the number of representatives to be elected from the county of Maui (both districts) to five (four in addition to the basic one initially allocated to each county).

Hawaii county is the largest in size of the island chain, although second in population. Compared to other islands distances between population centers is more significant. There is also a difference in the economy of different areas.

In recognition of these local districts, the delegates from Hawaii county chose to district the island into five districts, each bounding area having substantially the same community of interests.

In the 1950 apportionment, after the initial allocation of one representative to the county, it became en-

titled to seven additional members. These eight members were then apportioned among the five districts and, within each, the members were elected at large.

Four of the districts elected one representative each and one, embracing the bulk of urban Hilo, elected four.

The 1959 reapportionment resulted in a decrease in the county's total representation by one member and the lost member came from the Hilo district, which now elects only three members.

Delegates from Oahu, the fourth and most populated county, had a more difficult time in resolving the question of districts. With the 1950 apportionment allocating a total of 33 representatives to the county, it was obviously impractical to elect all 33 at large. Some division was required.

Although there were many alternative plans proposed, the final districts were chosen on an historical basis.

Long before Hawaii created county governments, it had divided the islands into districts for various administrative purposes.*

At the time of the Great Mahele, in 1848, the island of Oahu was divided into six districts, Ewa, Kona (later renamed Honolulu), Koolauloa, Koolaupoko, Waialua and Waianae. (See: Chinen, The Great Mahele, p. 3.)

In 1859 Ewa and Waianae were combined (Hawaiian Civil Code of 1859, s. 498) but, when the county act

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* Although Section 56 of the Hawaiian Organic Act provided that the legislature "may" create counties, no county governments were created until 1905.

was enacted in 1905, they were split into the separate districts that had existed at the time of the Great Mahele. (Session Laws of 1905, Act 39.)

It was natural for the delegates in 1950 to make reference to those major administrative districts that had existed for over 100 years in dividing Oahu into representative districts.

Initially, the delegates created three representative districts from the five rural districts of Koolauloa, Koolaupoko, Ewa, Waianae and Waialua.

Koolauloa and Koolaupoko (having a total registered voter population of 3,121) were combined to form the 8th representative district. These two districts join and are the only two on the "windward" side of the Koolau Range of mountains which splits the island of Oahu lengthwise.

The district of Waialua (having a registered voter population of 2,086) became the 9th representative district.

The districts of Ewa and Waianae (having a registered voter population of 2,953) were combined to form the 10th representative district.

Under the method of equal proportions, these districts each became entitled to two of the 33 representatives allocated to the island of Oahu.

The remaining 27 members were still too numerous to elect at large from the Honolulu district, the urban center of Oahu, and it became necessary to divide the Honolulu district into several smaller representative districts.

On what basis?

Again, the delegates turned to Hawaiian history for their answer.

> Their lives having been closely associated from ancient times with the soil, the Hawaiians took great interest in the lands on which they lived and from which they derived their livelihood. For purposes of easier control and management, the Hawaiians divided all the lands within the Islands into a number of divisions, gave each division a separate name, and defined its boundaries to the best of their ability. Certain persons were trained to retain the knowledge of these divisions, and such knowledge was carefully passed on from generation to generation.
>
> To a large extent, the Hawaiians made the divisions of the lands along rational lines, following a mountain ridge, the bottom of a ravine, or the center of a stream or river. But oftentimes only the line of growth of a certain type of tree or grass marked a boundary; and sometimes only a stone determined the corner of a division.
>
> The largest unit or division of land was, naturally, the island. Each island was then divided into a number of districts called "mokus". These districts or mokus were geographical subdivisions only, and no administrators were assigned to them. . . .
>
> A moku was divided for landholding purposes into units called "ahupuaas", each of which was ruled by either a chief or a konohiki. The ideal ahupuaa extended from the sea to the mountains, enabling the chief of the ahupuaa and his followers to obtain fish and seaweeds at the seashore, taro, bananas, and sweet potatoes from the lowlands, and forest products from the mountains. However, more often than not, an ahupuaa failed to to extend to either the mountain or the seashore, being cut off from one or the other by the odd shapes of

other ahupuaas. Although the ahupuaa has been called the "unit" of land in the Islands, it is not a measure of area as the acre is. While the acre contains a definte area, the ahupuaas vary in size. Though the smaller ahupuaas contain only a hundred acres of land, the larger ones contain more than 100,000 acres. (Chinen, The Great Mahele, pp. 1-3.)

Adhering, as nearly as possible, to the ancient Hawaiian "ahupuaa", the delgates created seven representative districts out of the District of Honolulu. Where there was any departure from the concept of divisions from the mountains, along the ridges and to the sea, it was to embrace within each representative district substantially the same number of registered voters. These representative districts, although not precisely defined in accordance with sections of Honolulu that were known by particular names, nevertheless followed substantially their boundaries.

Thus, areas known by name became representative districts, their names and the representative district numbers being as follows:

Popular Name	Representative District
Kalihi	11th district
Kapalama	12th district
Nuuanu	13th district
Pauoa	14th district
Manoa	15th district
Kaimuki	16th district
Wilhelmina Rise	17th district

Based upon the number of registered voters in each of these districts, the remaining 27 numbers were allocated within the district of Honolulu.

The result for the entire island, in terms of the number of registered voters for each representative of the district was as follows:

District	No. of Voters per Representative
8	3,121
9	2,086
10	2,953
11	2,497
12	2,164
13	2,271
14	2,574
15	2,599
16	2,374
17	2,095

For the entire island of Oahu, the number of voters per representative was 2,467. This number compared with the three other counties was: Hawaii, 1 to 2,559; Maui, 1 to 2,361; and Kauai, 1 to 2,305.

The Hawaii scheme is supported by legislative history and reason and is not arbitrary and capricious.

The scheme for apportioning members of the house of representatives in Hawaii among the several districts is kept current by the provisions of Article III, Section 4 of the State Constitution.

Regardless of changes in registered voter population in between reapportionment dates, an apportionment valid when accomplished remains valid for at least 10 years:

> Limitations on the frequency of reapportionment are justified by the need for stability and continuity in the organization of the legislative system, although undoubtedly reapportioning no more frequently than every 10 years leads to some

> imbalance in the population of districts toward the end of the decennial period and also to the development of resistance to change on the part of some incumbent legislators. In substance, we do not regard the Equal Protection Clause as requiring daily, monthly, annual or biennial reapportionment, so long as a State has a reasonably conceived plan for periodic readjustment of legislative representation. While we do not intend to indicate that decennial reapportionment is a constitutional requisite, compliance with such an approach would clearly meet the minimal requirements for maintaining a reasonably current scheme of legislative representation. And we do not mean to intimate that more frequent reapportionment would not be constitutionally permissible or practicably desirable. But if reapportionment were accomplished with less frequency, it would assuredly be constitutionally suspect. (*Reynolds* v. *Sims,* 377 U.S. at 583, 584.)

This appellee submits that the representative districts for the house of representatives are valid.

4. THERE WAS NO ERROR IN THE LOWER COURT'S DENYING THE EXISTENCE OF ANY LEGISLATIVE POWER TO ENACT A TEMPORARY APPORTIONMENT PLAN. UNDER THE CONSTITUTION OF THE STATE OF HAWAII REAPPORTIONMENT MAY BE ACCOMPLISHED ONLY BY CONSTITUTIONAL AMENDMENT. OF COURSE, THE DISTRICT COURT'S POWER TO PROVIDE AN INTERIM PLAN BY ITS OWN ORDER IS UNDOUBTED. The Hawaii State Constitution provides a scheme for apportioning the members of each house of the legislature. No provision is made for reapportioning the Senate except by constitutional amendment or revision, but the House of Representatives is required to be reapportioned at ten-year intervals by the Governor. The basis for such reapportion-

ment—the number of voters registered in each of the four counties and in each of 18 representative districts—is set forth in the constitution. The precise boundaries of each representative district are also set forth in and are an integral part of the constitution.

If these provisions are invalid, how can they be changed?

This appellee submits that changes in the constitution can only be made in the manner prescribed by the document itself—not by the legislature.

Section 55 of the Hawaiian Organic Act provided that:

> The legislature, at its first regular session after the census enumeration shall be ascertained, and from time to time thereafter, shall reapportion the membership in the senate and house of representatives among the senatorial and representative districts on the basis of the population in each of said districts who are citizens of the Territory.

The Hawaiian Organic Act was approved and took effect April 30, 1900.

No such reapportionment was ever accomplished by the legislature and this fact was known to the delegates of the constitutional convention. In designing a method of reapportioning members of the legislature, the delegates deliberately removed the legislature from *any* role whatever in such function.

The duty of reapportioning the House of Representatives was granted to the Governor, who could be compelled by mandamus to do his duty. (Haw. Const., Art. III, Sec. 4)

No provision was made for periodic reapportionment of the Senate. Any such reapportionment was to be made only by amendment and then only with the approval of the majority of the voters in each of the majority of the counties. (Haw. Const., Art. XV, Sec. 2)

References to correction of legislative malapportionment by legislatures of other states are inappropriate and meaningless.

In Alabama (*Reynolds* v. *Sims*) the constitution granted power to the legislature to reapportion both houses of the legislature. (see Ala. Const., Art. IV, Sec. 50 and Art. IX, Secs. 198-203.)

In New York (*WMCA* v. *Lomenzo*) reapportionment was a function of the legislature. (see New York Const., Art. III, Secs. 3-5.)

In Colorado (*Lucas* v. *General Assembly*) the legislature was the apportioning authority. (see Colo. Const., Art. V, Secs. 45-49.)

In Virginia (*Davis* v. *Mann*) the general assembly was the apportioning authority. (see Virg. Const., Art. IV, Sec. 43.)

In Delaware (*Roman* v. *Sincock*) districts were specifically established by the constitution and no provision was made in the constitution for reapportioning either house. However, amendments to the constitution are permitted to be made by passage of an amendment by two consecutive legislatures, without a requirement of a popular referendum. (see Del. Const., Art. XVI, Secs. 1, 2.)

In Maryland (*The Maryland Committee etc.* v. *Tawes*) the constitution provides that the Governor

shall reapportion the House and no provision is made for reapportionment of the Senate. (Md. Const., Art. III, Secs. 2, 5.)

In each of the above cases, the legislatures of the states had constitutionally granted power to reapportion. In only one, Maryland, was there no constitutional grant of power to the legislature to do so.

In *Maryland Committee etc.* v. *Tawes,* 228 Md. 412, 180 A. 2d 656, the court decided the apportionment of the Maryland General Assembly was invalid. In considering the relief to be given, the court noted that relief asked was to restrain the election officials from conducting the November 1962 election under the existing apportionment plan. Noting that there was no provision for at-large elections, the majority concluded that if it should declare the existing apportionment invalid for the 1962 election:

> it should also declare that the Legislature has the power, if called into Special Session by the Governor and such action be deemed appropriate by it, to enact a bill reapportioning its members for purposes of the November, 1962 election. (180 A. 2d, at 670)

As justification for such action, the majority asserted:

> With Sections 2 and/or 5 no longer a part of the Constitution with reference to said election, this necessarily follows, because the powers of the General Assembly of Maryland are plenary, except as limited by constitutional provisions. *McMullen* v. *Shephard,* 133 Md. 157, 104 A. 424; *Brawner* v. *Supervisors,* 141 Md. 586, 119 A. 250; *Hennegan* v. *Geartner,* 186 Md. 551, 47 A. 2d 393. 180 A. 2d, at 670)

This assertion was challenged by two dissenting justices:

> The statement in the majority opinion in the instant case, if the provisions of the Maryland Constitution, Article III, Sections 2 and 5, were stricken down, in whole or in part, the Legislature would possess the power to remedy the situation, I think is gratuitous and unsupportable. The point is not properly before us under Maryland Rule 885, since it was not raised below, and was never mentioned in the arguments in this court . . .
>
> . . . In any event, the matter of how the Legislature shall be elected has always been regulated in Maryland by the Constitution itself. To my mind, no doctrine of plenary or inherent powers can take away a right to deal with a subject matter expressly reserved to the people of this state, and vest it in a legislative body. cf. *Bennett* v. *Jackson,* 186 Ind. 533, 116 N.E. 921. (180 A. 2d at 674)

In *Bennett* v. *Jackson,* the legislature had enacted a bill calling for a constitutional convention. No power was granted in the state constitution to the legislature to do so and the validity of its action was challenged.

The court, relying in part on *Ellingham* v. *Dye,* 178 Ind. 336, 99 N.E. 1, declared the act void, stating:

> If the passage of such a bill is within the purview of the Constitution governing ordinary legislation, there would be no question but that the General Assembly might, without any suggestions, proceed to the enactment of such legislation, for the reason that within the field of legislation as fixed by section 1, article 4, of the present Constitution, the Legislature is supreme and its actions are circumscribed only by the terms of the state or federal constitutions . . .

> The Legislature has no inherent rights. Its powers are derived from the Constitution, and hence, where some action of the legislative body, which action is outside of the particular field fixed by the Constitution and is not strictly legislative within the meaning of section 1, article 4, supra, is sought to be justified, a warrant for the same must be found somewhere; if not in the Constitution, then directly from the people, who, by the terms of section 1, article 1, of the Bill of Rights, have retained the right to amend or change their form of government. The right of the people in this regard is supreme, subject, however, to the condition that no new form of a Constitution can be established on the ruins of the old without some action on the part of the representatives of the old indicating their acquiescence therein. (116 N.E., at 922-923)

In *Ellingham* v. *Dye,* 178 Ind. 336, 99 N.E. 1, Writ of Error dismissed, 231 U.S. 250, the challenge was to a legislative enactment purporting to amend the existing state constitution, subject to voter approval after submission to the voters. The underlying question was whether or not the act was a valid exercise of legislative power.

The argument was made that the legislature had the power to initiate, draft and submit a new constitution to the people in such form and manner as would enable them to adopt it as the organic law of the State.

The court rejected this proposition, stating that:

> The words "legislative power", in a constitutional delegation of general legislative authority, "mean the power or authority, under the Constitution or frame of government, to make, alter and repeal laws". . . . To erect the State, to institute the

> form of its government, is a function inherent in the sovereign people; . . . (99 N.E., at 4)

The court also asserted:

> It is settled that amendments to our [State] constitutions are to be made only in modes pointed out or sanctioned by the instrument itself, the legal exponent of the will of the majority, which alone is entitled to the force of law.

Other cases, unlike *Maryland Committee etc.* v. *Tawes, supra,* where the point has been raised and argued, have likewise held that a constitution can only be amended in the constitutionally prescribed manner.

Even necessitous circumstances do not give any license to disregard constitutional provisions.

> Necessity that is higher than the Constitution can safely have no place in American jurisprudence. That principle is necessarily vicious in its tendency, and subversive to the Constitution. It should be, and is, limited by the constitutional inhibitions. . . . The Constitution, and a controlling necessity antagonistic to its requirements, cannot exist. 9 Tex. Jur. P. 421, § 10; quoted with approval in *Traveler's Ins. Co.* v. *Marshall,* 76 S.W. 2d 1007 (Texas)

See: *Johnson* v. *Croft,* (Ala.) 87 So. 375, 376; *Crawford* v. *Gilchrist,* (Fla.) 59 So. 963.

And in *State* v. *Arregui,* 254 Pac. 788, 52 ALR 463, 471, it is stated that:

> Law and court-made rules of expediency must not be placed above the Constitution.
>
> . . . . .
>
> If, one by one, the rights guaranteed by the federal Constitution, can and must, for expediency's

sake, be violated, abolished, stricken from that immortal document, and from state constitutions, we will find ourselves governed by expediency, not laws or constitutions, and the revolution will have come.

Neither can ~~this court~~ a State Supreme Court amend the constitution, by requiring elections at large or by reapportioning the legislature according to its own formulae.

In *Miller* v. *Johnson,* 92 Ky. 589, 18 S.W. 522, the court acknowledged that the judiciary cannot compel a co-equal department to perform a duty.

> It is responsible to the people; but if it does act, then, when the question is properly presented, it is the duty of the Court to say whether it has conformed to the organic law. While the judiciary should protect the rights of the people with great care and jealousy, because this is its duty, and also because, in times of great popular excitement, it is usually their last resort yet it should at the same time be careful not to overstep the proper bounds of its power as being perhaps equally dangerous; and especially where such momentous results might follow as would be likely in this instance, if the power of the judiciary permitted, and its duty required, the overthrow of the work of the convention.

In *State* v. *Thorson,* 9 S.D. 149, 68 N.W. 202, it was stated that:

> The powers of the state government are divided into three distinct departments—the legislative, executive, and judicial. The powers and duties of each are prescribed by the constitution. Const. art. 2. Power to amend the constitution belongs exclusively to the legislature and electors. It is legislation of the most important character. This

> court has power to determine what such legislation is, what the constitution contains, but not what it should contain. It has power to determine what statutory laws exist, and whether or not they conflict with the constitution; but it cannot say what laws shall or shall not be enacted.

In *Radford* v. *Gary,* 352 U.S. 991, the Supreme Court affirmed the District Court's refusal to mandamus the Governor to call a session of the legislature, to mandamus the legislature then to apportion, and if they did not comply, to mandamus the State Supreme Court to do so.

People ex rel Sammons v. *Snow,* 340 Ill. 464, 173 N.E. 8, involved excessive bail required of an alleged vagrant in violation of the Illinois Constitution. The court stated that:

> The judge has no more right to disregard and violate the Constitution than the criminal has to violate the law. It is the duty of the courts to support and maintain the Constitution, and if the judges, who have taken an oath to support the Constitution, openly violate it, how can they expect the courts to retain the confidence and respect of the people. (72 ALR, at 801)

In *Sweeney Jr. et al.* v. *Notte,* 183 A. 2d 296 (R. I.), an action involving alleged legislative malapportionment, it was stated that:

> In the absence of constitutional warrant to the contrary this court has no authority to require the general assembly to meet in special session, nor to require the governor to exercise his constitutional prerogative to call such a session. Furthermore, we are not persuaded that our obligation to resolve the justiciable issues herein considered is so

broad as to require us to hold that the superior court would be warranted in supervising reapportionment of the house of representatives, in the unlikely event that the general assembly should fail to do so. Such a declaration would be in the nature of mandamus by duress. In light of the exclusive prerogative of the general assembly to apportion the membership of the house, we will respect the co-ordinate relationship existing between us.

We do deem it obligatory upon us, however, to observe that if the general assembly fails, within such reasonable time as circumstances may permit, to reapportion the house of representatives consistent with the equal protection guaranteed by the United States constitution, a federal court will probably do so.

In a concurring opinion, the proposition was put in this manner:

I am convinced, however, that because the power to apportion in this state is textually committed by the constitution to the legislature, the power of this court in the manner extends only to a determination of the constitutionality of apportionment legislation. The courts of this state, in my opinion, are without power, inherent or conferred, to apportion the house of representatives either directly or indirectly by resort to the equity jurisdiction. I have not been persuaded that the courts of this state possess any power to enjoin the elective process established by the legislature absent some showing of action by an officer or board in excess of the authority conferred by such legislation or of the invalidity of that legislation on constitutional grounds. In the instant action the laws of the state establishing the elective process have not been challenged.

> When it is found that an apportionment statute is repugnant to the equal protection clause of the federal constitution, the duty to provide for an apportionment that will not be in conflict with the provisions of the fourteenth amendment as the supreme law of the land is cast upon the legislature. See *Cooper* v. *Aaron,* 358 U.S. 1. This court is not warranted in concluding that this coordinate branch of the state government, having been made aware of the unconstitutionality of the existing apportionment legislation, will not move promptly and effectively to provide for an apportionment that will be consistent with the supreme law of the land.

In Rhode Island, the apportioning authority was granted by the constitution to the legislature. As previously stated, changes in district boundaries and in the bases for apportionment of each house, were reserved to the people.

The Hawaii State Constitution provides, in Article I, Section 1:

> All political power of this State is inherent in the people; and the responsibility for the exercise thereof rests with the people. All government is founded on this authority.

Article III, Section 1, provides:

> The legislative power of the State shall be vested in a legislature, which shall consist of two houses, a senate and a house of representatives. Such power shall extend to all rightful subjects of legislation, not inconsistent with this constitution or the Constitution of the United States.

It is submitted that with powers of constitutional amendment having been reserved to the people, with

the people having all political power inherent in themselves, and with the legislative power of the legislature extending only to subjects of *legislation* not inconsistent with the State Constitution, that it is eminently clear that the lower Court had no authority to direct the legislature to amend the constitution, or to amend the constitution by any judicial decree or order.

This Court, in *The Maryland Committee for Fair Representation* v. *Tawes,* 377 U.S. 595, accepted the Maryland Court of Appeals' interpretation of the existence of legislative power to reapportion because that Court had found it to exist:

> With the Maryland constitutional provisions relating to legislative apportionment hereby held unconstitutional, the Maryland legislature *presumably* has the inherent power to enact at least temporary reapportionment legislation pending adoption of state constitutional provisions relating to legislative apportionment which comport with federal constitutional requirements. (377 U.S. at 675-676.)

That this Court was *accepting* the Maryland Court of Appeals' interpretation was made eminently clear by the Court's footnote, following the above quotation:

> 23. See 228 Md., at 438-440, 180 A. 2d, at 670-671, where the Maryland Court of Appeals stated that, if the Maryland constitutional provisions relating to legislative apportionment were found invalid by the lower court, the Maryland Legislature would have the power to enact reapportionment legislation, "because the powers of the General Assembly of Maryland are plenary, except as limited by constitutional provisions". See also the reference to this matter earlier in this opinion, ante at [377 U.S. 670.] (377 U.S. at 675-676.)

In *Guntert* v. *Richardson,* 47 Haw. 662, 394 P. 2d 444, the Hawaii Supreme Court held the Hawaii State Constitution required any change in the apportionment of the senate to be by constitutional amendment. Such holding was not dictum, as claimed by the appellant in No. 318. (Brief, page 89.) The question was clearly before the Court:

> At least in the initial stages of the problem presented by the invalidity of this provision [Article III], the question whether such invalidity can be cured by act of the legislature itself, or requires an amendment of the State Constitution, is one of local law, not federal constitutional right. We note that the Supreme Court has said that "the delay inherent in following the state constitutional prescription for approval of constitutional amendments * * * cannot be allowed to result in an unpermissible deprivation of [the] right to an adequate voice in the election of legislators * * *." Roman v. Sincock, supra. But that was said in a case where, at the time of rendition of the Supreme Court opinion, the case had been pending for two years during which a constitutional amendment had been achieved but had proved invalid. We see no indication that the matter of the machinery to be used to cure the invalidity of the Senate plan presents a federal question at the inception of Hawaii's efforts in that direction.
>
> Viewing this as a local question we note that Article XV, section 2, paragraph 6 of the State Constitution provides that any constitutional amendment shall be approved by a majority of the votes tallied upon the question, constituting at least 35% of the voters, and specifically provides that "no constitutional amendment altering * * * the representation from any senatorial district in the senate shall become effective unless it shall also be approved by a majority of the votes tallied

upon the question in each of a majority of the counties." The agreed statement sets out that the parties are in agreement that this provision "contains a built-in impediment which has the necessary effect of perpetuating inequality in senatorial representation, and therefore is violative of the equal protection clause of the 14th Amendment * * *." Since the parties are in agreement, no justiciable controversy is presented as to this matter, and perhaps that would be true at this stage in any event. The point now of importance is that the quoted provision plainly contemplates that any change in the representation from any senatorial district will be by constitutional amendment. Even if the added provision as to a majority vote in a majority of the counties should prove to be unconstitutional, that would not render invalid the requirement that the change be by constitutional amendment.

If any step is to be taken toward a constitutional amendment or amendments it should be done before the 1964 elections, in order to avoid delay in obtaining a vote of the people as provided by Article XV. However, the legislature is now in special session. We must and do assume that the legislature will take suitable action. That possibility provides justification "for a court of equity to stay its hand temporarily."

What ~~That~~ the Hawaii Supreme Court did not decide was whether *it* had the power to set aside this constitutional requirement:

In the second place, in order to interfere with the 1964 elections on the theory that a temporary reapportionment plan should be put into effect for those elections, we would have to be convinced that plaintiffs' rights under the federal constitution require this mutation of the State Constitution without even awaiting a reasonable oppor-

> tunity for the State Constitution to operate as intended. We lay aside that question because there are other considerations which make it unnecessary to decide it, at least at this time. (at page 670.)

This appellee respectfully submits that the lower Court was correct in holding that the legislature had no apportioning powers and that, except for an interim plan made effective by order of the court, any reapportionment of the Hawaii legislature must be by constitutional amendment. The question is one of local law, it has been decided by the Hawaii Supreme Court, and this Court is bound to accept that determination, just as it did in *The Maryland Committee for Fair Representation* v. *Tawes,* 377 U.S. 656.

5. THE LOWER COURT WAS CORRECT IN REQUIRING THE LEGISLATURE TO PROVIDE THE MACHINERY FOR A CONSTITUTIONAL CONVENTION TO CORRECT THE MALAPPORTIONMENT OF THE SENATE. THIS WAS THE ONLY MEANS BY WHICH THE PEOPLE OF HAWAII COULD ACT WITHIN THE 1966 GENERAL ELECTION DEADLINE APPARENTLY SET BY THIS COURT. The lower Court determined that the Hawaii Senate, at least, must be reapportioned before the 1966 general election. In doing so, it obviously adhered to the apparent deadline set by this Court in the June, 1964, Reapportionment cases.

In ordering a constitutional convention, the lower Court also followed the blessing given by this Court to the lower Court in *Reynolds* v. *Sims, supra,* at 541:

> We feel that the District Court in this case acted in a most proper and commendable manner. It initially acted wisely in declining to stay the im-

pending primary election in Alabama, and properly refrained from acting further until the Alabama Legislature had been given an opportunity to remedy the admitted discrepancies in the State's legislative apportionment scheme, while initially stating some of its views to provide guidelines for legislative action. And it correctly recognized that legislative reapportionment is primarily a matter for legislative consideration and determination, and that judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so.

Because in *Alabama* apportionment is a legislative function and in *Hawaii* it is not, being a matter expressly reserved to the people through constitutional amendment, the lower Court in the instant case properly read the above-quoted language as an approval of this Court to deferring court action until the people of Hawaii "had been given an opportunity to remedy the admitted discrepancies in the State's legislative apportionment scheme".

And the only way the people of Hawaii could do so within the time provided was by constitutional convention.

There are only two ways set forth in Hawaii's constitution for amending that document. (Haw. Const., Art. XV, Sec. 1.)

One is by the legislature proposing an amendment to the people for their approval. Such legislative proposal may be submitted to a vote *only* at a general election. (Haw. Const., Art. XV, Sec. 3.)

It is obvious that this method could not be used as the amendment could not be effective prior to the general election in 1966. It was, therefore, not used by the court in its order.

The other method is by a constitutional convention being convened for the purpose of proposing amendments to the people for their approval. (Haw. Const., Art. XV, Sec. 2.)

This method was workable because the elections required by Article XV, Section 2, may be *special* elections—each of which could be held *prior* to the *general* election in 1966.

After the lower Court had entered its February 17, 1965, order calling for a convention (for the obvious reasons noted above) the legislative parties asked the Court to amend that order to permit the legislature to propose to the Court a reapportionment plan that the Court could make effective by its own order in time for the election of senators in 1966. Because of considerations of time and expense, the Court modified its order of February 17 to permit the legislature to: (1) propose a temporary plan for the Court to approve and order into effect, (2) propose a constitutional amendment for a permanent plan that could be voted on at the 1966 general election and (3) to cause the question of calling a convention to be placed on the ballot at the general election in 1966.

When the legislature failed to produce a temporary plan satisfactory to the District Court for the conduct of the 1966 election of senators, the lower Court reinstated all of the provisions of its order of February 17, 1965.

The District Court had fully advised the legislative parties that this is what it would do if no acceptable proposal was forthcoming under the modification of its February 17, 1965, order:

> If the measures set forth in paragraphs (a), (b) and (c) above shall not have been enacted and adopted by the legislature on or before the twentieth calendar day following the date of the order granting the motion to amend the said Decision and Order, and made operative, and if the same after hearing *shall not have been approved by the court,* then, as far as then and thereafter applicable, item 4 on pages 19 and 20 and item 6 on pages 20 and 21 of the Decision and Order dated February 17, 1965 shall become automatically reinstated and thereafter remain in full force and effect as if the Motion to Amend the same had not been granted.
>
> * * * * * * * * *
>
> 6. This court retains jurisdiction of this action for all purposes, including but not limited to:
>
> "(a) considering such sanctions as may be appropriate if the orders of this court are not carried out; and
>
> "(b) judicially reapportioning and redistricting the Senate, in the event that the obligations of the parties above indicated are not fulfilled, or any reapportionment plan so enacted *is not approved by the court,* or the electors of Hawaii at the 1966 general election reject the proposed and court-approved constitutional amendment reapportioning the Senate, or under any other circumstances which this court shall deem appropriate.

At the time of the reinstatement of the Court's February 17, 1965, order on April 28, 1965, the time limits

set forth in the order were still within the reach of the legislature and the people in so far as the constitutional convention was concerned. And, the legislature was still in session with sufficient time to comply with the order. Appeals were, instead filed, and there was no further effort by the legislature to comply.

This appellee contends that there was no error committed by requiring the legislature to follow the Constitution of the State of Hawaii.

6. THE LOWER COURT HAD POWER TO RESTRAIN THE LEGISLATURE FROM TAKING ACTION ON OTHER MATTERS UNTIL THE LEGISLATURE COMPLIED WITH THE COURT'S ORDER, AND IT DID NOT ABUSE ITS DISCRETION IN DOING SO. Mr. Justice Frankfurter, dissenting in *Baker* v. *Carr,* 369 U.S. 186, at 268, observed that the Court's opinion conveyed "no intimation what relief, if any, a District Court is capable of affording that would not invite legislatures to play ducks and drakes with the judiciary".

It would appear reasonably obvious that if the game is to be played under rules laid down by the legislature, the judiciary may never win.

If played under the Court's rules the judiciary has, at least, an even chance.

So long as the order restraining the legislature from taking action on matters other than in compliance with the Court's orders was in force, the legislature worked on reapportionment matters. Once the restraint was lifted, nothing further in compliance with the Court's order was done.

This appellee submits that such a restraint as was imposed upon the Hawaii legislature was within the

power of the District Court and that its exercise was not an abuse of discretion.

7. THERE WAS NO ERROR IN THE LOWER COURT REFUSING TO APPROVE THE LEGISLATURE'S APPORTIONMENT SCHEME. At the time the District Court modified its February 17, 1965, order to permit the legislature to propose a reapportionment plan, it was clear to all that such a proposal had to be approved by the Court and that it would have effect only as an order of the Court.

As stated in the Appellant's Brief in No. 318 (at pages 16 and 17), following the modification of the Court's order, the legislature first proposed a plan of reapportionment for the Senate which would have divided Oahu into only two districts, from which nine and ten of the total of 25 senators would be elected. The Court informally gave notice that such a plan would not be acceptable to it, and gave written notice (see Appellant's Brief in No. 318, App. B., pp. 28a-29a) of the kind of an apportionment plan the Court had in mind if it were to fashion its own plan.

The legislature disregarded the advice, fashioning instead, a plan so different that the Court refused to accept it.

This appellee agrees with the statement of the Appellant in No. 318 that:

> As we have noted, the order of the District Court under which the Legislature's provisional plan for the Senate was submitted required that that plan be "approved" by the District Court, and the Legislature's Senate provisional plan provided that it should not go into effect without that approval. The Legislature's provisional plan for the

Senate, of course, was one which had had to win the approval of the very Senate which the District Court had held to be improperly constituted.

The District Court's disapproval, on the grounds stated in its opinion, is sustainable even if those grounds do not constitute a violation of the Fourteenth Amendment. The District Court has a broad power to fashion a remedy for previous unconstitutional state action. In *Fortson* v. *Toombs*, 379 U.S. 621 (1965), this Court stressed the "wide range" of discretion possessed by a district court in fashioning decrees to remedy malapportionment. The District Court could have fashioned and executed a reapportionment of the Senate itself, although it acted wisely in deferring doing so until plans had been submitted to it by the Legislature; if it had not deferred, the court would have had to make determinations not dictated by the Constitution. (Brief, at 104, 105)

CONCLUSION

For the reasons stated, the decision and Order of the District Court, dated February 17, 1965, as well as the Decision and Order, dated April 28, 1965, should be affirmed, at least in so far as they pertain to constitutional questions.

In terms of remedies, the passage of time has made the time table for legislative and convention action, set forth in the February 17, 1965, order, inappropriate and the District Court will, of necessity, have to change those times. Because any realistic time table would without doubt extend beyond the 1966 general election, a temporary plan will have to be ordered into effect by the District Court for application to the election of senators at that election.

In this regard, it is submitted that any temporary plan fashioned by the District Court should avoid precluding the people of Hawaii from having a free choice in the development of a permanent apportionment plan.

Respectfully submitted,

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In the

Supreme Court of the United States

October Term, 1965

Nos. 315, 323 and 409

JOHN A. BURNS, GOVERNOR OF THE STATE OF HAWAII, *Appellant,*

v.

WILLIAM S. RICHARDSON, *et al.,* *Appellees.*

ELMER F. CRAVALHO, *et al.,* *Appellants,*

v.

WILLIAM S. RICHARDSON, *et al.,* *Appellees.*

KAZUHISA ABE, *et al.,* *Appellants,*

v.

WILLIAM S. RICHARDSON, *et al.,* *Appellees.*

ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

BRIEF FOR PLAINTIFFS-APPELLEES

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965
NOS. 318, 323 AND 409

JOHN A. BURNS, Governor of the Startae of Hawaii,
Appellant,

v.

WILLIAM S. RICHARDSON, *et al.*,
Appellees.

ELMER F. CRAVALHO, *et al.*,
Appellants,

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WILLIAM S. RICHARDSON, *et al.*,
Appellees.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

BRIEF FOR PLAINTIFFS-APPELLEES

QUESTIONS PRESENTED

1. Whether the apportionment of seats in the legislature of the State of Hawaii on the basis of registered voters violates the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States.

2. Whether the election of members of both houses of the legislature of the State of Hawaii from single-member districts and multi-member districts of varying sizes violates the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States.

3. Whether the legislature of the State of Hawaii is entitled to an opportunity to fashion a reapportionment plan covering both houses of the legislature.

STATEMENT

Plaintiffs filed their complaint on August 13, 1964. (R. 1) At that time a special session of the legislature, called specifically for the purpose of considering reapportionment problem, was in session but had not adopted any reapportionment plan. (R. 10-11, 54)

The material allegations of plaintiffs' complaint are correctly set forth in the statement of the case in the Governor's brief.

Upon the allegations of their complaint, plaintiffs prayed for the convening of a three-judge district court and sought injunctive or other relief applicable to the 1964 elections, and, in addition thereto, a judgment:

(a) declaring the invalidity of those portions of the State constitution which apportioned the senate on the basis of geography and the house of representatives on the basis of registered voters and which requires a majority vote in each of a majority of counties for constitutional amendment altering the representation from any senatorial district;

(b) declaring that the legislature may provide for apportionment by statute, pending the adoption of appropriate constitutional amendment;

(c) ordering the 1966 elections to be conducted in accord-

ance with reapportionment plan prepared by the court upon failure of enactment of a valid reapportionment statute or adoption of a valid constitutional amendment; and

(d) retaining jurisdiction of the cause to review any reapportionment plan which may be enacted or adopted, and, in that connection, to permit plaintiffs to amend their complaint and pray for appropriate relief. (R. 11-13)

A three-judge court convened on August 24, 1964. At that time, Governor Burns was allowed to intervene as plaintiff and certain senators and representatives were allowed to intervene as defendants. (R. 37, 43, 49, 191) On August 26, 1964, the court denied injunctive and other relief applicable to the 1964 elections because the elections were imminent, an injunction would have disruptive effects on the elections, and the legislature was in session to consider the problems of reapportionment. (R. 63, 192) On the same day, the legislature adjourned without taking any action on reapportionment. (R. 54) This was disappointing to the court. (R. 78) The court set the case for hearing on the merits on January 11, 1965. (R. 192)

The hearing on the merits commenced on January 11, 1965, as ordered by the court, and was concluded two days later. On February 17, 1965, one week before the convening of the regular session of the Third State Legislature, the court announced its decision and order in which it declared and ordered:

1. that the provisions of Article III, Section 2, of the State constitution fixing the number of senators per senatorial district are invalid, but the remainder of Article III is valid.

2. that the proviso at the end of the sixth paragraph of Article XV, Section 2, pertaining to amendments affecting representation in the senate is invalid, but the remainder of Article XV is valid;

3. that the plaintiffs and intervening plaintiff failed to prove that the apportionment of the house of representatives causes any invidious discrimination in the weight of their vote or is the result of arbitrary or capricious action;

4. that the Third State Legislature may convene in regular session, take such actions as are necessary to organize the

respective houses, and appropriate funds for the session, but shall not take final action on any other legislation until it shall have enacted into law a legislation:

(a) providing for submission to the people of Hawaii at a special election to be held not later than August 1, 1965, pursuant to Article XV of the constitution, the question: "Shall there be a convention to propose a revision of or amendments to the constitution?"

(b) providing for any and all acts required by law to implement such legislation;

(c) providing for the holding, if the vote shall be in the constitutional affirmative, of a special election not later than September 15, 1965, for the election of delegates to the convention in the manner provided in the constitution, the legislation to include legislative action under the fourth paragraph of Article XV, Section 2, of the constitution, if the legislature so wills;

(d) providing for the convening of the convention not later than October 15, 1965, and the completion of its deliberation in time to submit its proposed constitutional amendments to the electorate at a special election to be held not later than January 30, 1966, such amendments to include, but not limited to, provisions for reapportioning the senate on a constitutionally valid basis; and

(e) providing appropriation and funds for such elections and convention.

5. that the offices of all senators shall become vacant as of the day of the general election of 1966, but until such date the existing offices of all senators elected under Article III, Section 2, of the constitution shall be valid; and

6. that the court retains jurisdiction of the cause for all purposes, including, but not limited to:

(a) considering appropriate sanctions if the orders of the court are not carried out; and

(b) judicially reapportioning the senate in the event the electors reject a constitutional convention, or the convention fails to propose an amendment reapportioning the senate, or the electors reject such amendment, or if the amendment proposed by the convention does not insure the apportionment of the senate in accordance with the requirements of the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States. (R. 79-81)

The remainder of Article III of the State constitution which the court declared valid under paragraph 1 of its February 17, 1965, decision and order includes:

(a) the remainder of Section 2, which sets the number of senators at 25, the number of senatorial districts at 6, and describes the geographical limits of each senatorial district;

(b) all of Section 3 (including the Schedule in Article XVI which is incorporated in Section 3 by reference), which sets the number of representatives at 51, the number of representative districts at 18, describes the geographical limits of each representative district, and fixes the number of representatives to be elected from each representative district; and

(c) all of Section 4, which provides for reapportionment of the house of representatives on registered-voter basis without changing the boundaries of the representative districts except where the number of registered voters in any representative district is less than one-half of the quotient obtained by dividing the total number of registered voters in the State by the total number of members of the house of representatives.

The remainder of Article XV of the constitution which the court declared valid under paragraph 2 of the decision and order includes:

(a) the first paragraph of Section 1, which provides that constitutional amendments may be proposed by a constitutional convention or by the legislature;

(b) the fourth paragraph of Section 2, which provides that, unless the legislature provides otherwise, there shall be the same number of delegates to the convention, elected from the same areas, as nearly as practicable, as required for the Hawaii State Constitutional Convention of 1950; and

(c) all of Section 3, which establishes the procedure for constitutional amendment where an amendment is proposed by the legislature.

The court ordered reapportionment by constitutional convention because it felt compelled to do so in the face of the failure of the legislature to take any action during its special reapportionment session. (R. 88) It did not limit the convention to a consideration of reapportionment of the senate, but stated that the delegates may review and reconsider the respective merits of apportionment based on total population, citizen population, or eligible voters, as against the existing registered-voter basis, and also the respective merits of having the members of one or both houses of the legislature elected from single member districts as against having the members of one or both houses elected, in whole or in part, from multi-member or floterial districts and justifying the same. (R. 79)

On March 1, 1965, the senators and representatives, who had intervened as intervenors-defendants, filed a motion to amend the February 17, 1965, decision and order to allow the legislature:

(a) to adopt a redistricting plan for the senate on the basis of 1964 registered voters, subject to approval by the court;

(b) to adopt a proposed constitutional amendment, embodying pertinent provisions of the foregoing plan, to be presented to the electorate for ratification at the 1966 general election, subject to approval by the court; and

(c) to enact legislation providing for submission to the electorate at the 1966 general election the question: "Shall there be a convention to propose a revision of or amendments to the constitution?" (R. 83)

The intervenors-defendants gave the following reasons for the motion:

(a) the State Department of Budget and Finance estimated the total cost of the constitutional convention and the three elections to be in excess of $1,000,000;

(b) the holding of three elections and a convention in a period of six months would be unduly cumbersome;

(c) the convention would not be limited to a consideration of senatorial reapportionment and might be diverted from its primary task;

(d) Article XV, Section 2, of the constitution mandates the lieutenant governor to submit to the people at the 1970 general election the quesiton as to whether a convention should be held; and

(e) the legislature contemplates submitting to the people at the 1966 general election the question as to whether a constitutional convention should be held. (R. 86)

All parties joined in the motion. (R. 88, 194) The court granted the motion on March 9, 1965, stating: "Based upon the current actions of the legislators, followed by the representations by counsel for all parties to this suit that all are in accord with the objectives outlined in the motion to alter or amend judgment, this court is now convinced that the legislative climate has changed and that the legislators presently in session are now prepared to undertake the formulation of a plan for reapportioning the Senate which can be constitutionally justified." (R. 88)

On April 15, 1965, the intervenors-defendants presented the plan of the legislature embodied in:

1. H. B. No. 987, S. D. 1, C. D. 1, being a reapportionment and redistricting plan for the senate on the basis of 1964 registered voters;

2. H. B. No. 773, S. D. 1, C. D. 1, being a proposed constitutional amendment embodying pertinent provisions of H. B. No. 987, S. D. 1, C. D. 1, to be submitted to the electorate for ratification at the 1966 general election; and

3. H. B. No. 986, being legislation providing for submission to the electorate at the 1966 general election the question: "Shall there be a convention to propose a revision or amendments to the constitution?" (R. 103)

H. B. No. 987, S. D. 1, C. D. 1, and H. B. 773, S. D. 1, C. D. 1, will be referred to hereafter in this brief as H. B. 987 and H. B. 773, respectively.

Together with the foregoing legislation, the intervenors-defendants presented conference committee reports which set forth the reasons and justification for the legislation. (R. 105, 109)

The legislation embodied in H. B. No. 987 was to become effective for the 1966 general election and to remain in effect until superseded by constitutional amendment.

Under the order granting the motion of intervenors-defendants, only the senate was to be reapportioned. (R. 88) Consequently, the legislature concerned itself solely with senatorial reapportionment and did not give any consideration to reapportionment of the house of representatives. (R. 297)

The plan submitted by the legislature to the court kept the number of senators at 25, constituted each of the counties of Hawaii, Maui and Kauai as a senatorial district, divided the island of Oahu (which constitutes the City and County of Honolulu) into five senatorial districts, and apportioned the senators to the senatorial districts on the basis of the 1964 registered voters, as follows:

Senatorial Districts		Number of Senators	1964 Registered Voters	Registered Voters Per Senator
Hawaii	First	3	28,130	9,377
Maui	Second	2	18,786	9,393
Oahu	Third	3	27,073	9,024
	Fourth	4	35,780	8,945
	Fifth	4	39,361	9,840
	Sixth	4	40,629	10,157
	Seventh	4	37,336	9,334
Kauai	Eighth	1	12,266	12,266
		25	239,361	

Average: 239,361 ÷ 25 = 9,574
(Ex. S-8, R. 411)

On April 28, 1965, the court entered its decision and order rejecting the plan embodied in H. B. No. 987, and in view thereof, found it unnecessary to consider H. B. No. 773 and H. B. No. 986.

The plan of the legislature appeared doomed from the start, for the judges had previously circulated a memorandum, which stated:

"We believe the Senate should be redistricted into single senatorial districts, although we may approve two-member districts if and only if the legislature can affirmatively show substantial reasons therefor. There may very well be valid reasons for one or two 2-member districts in the neighboring islands but we perceive no justification whatsoever for other than single member districts on the Island of Oahu, particularly the heavily populated areas."

The court rejected the plan on the following grounds:

(a) in fixing the boundaries of senatorial districts, only geographical boundaries, historical representative district lines, and the number of registered voters were considered, and ethnic, political, industrial, economic, social, and occupational factors, and community of interests and problems were ignored; (R. 156)

(b) by fixing the boundaries of multi-member senatorial districts along multi-member representative district lines, political monoliths were created, giving the voters in such districts political weight far in excess of the political weight of voters in smaller districts; (R. 160)

(c) the legislature ignored the red lights flashed by the court, and viewed the reapportionment scheme of the senate as if it were something that could be fashioned without consideration of its tight juxtaposition to the house of representatives; (R. 162)

(d) it was manifest to the court "that the legislature's adamant insistence on three- and four-member senatorial districting was the conscious or unconscious — though not unnatural — reluctance of the affected senators to carve out single-member districts which thereafter would

in all probability result in a political duel-to-the-death with a fellow and neighbor senator." (R. 163)

There were three principal witnesses at the hearings in this case: Robert Schmitt, State Statistician; Eileen Lota, Clerk of the City and County of Honolulu; and Sakae Takahashi, State Senator and Chairman of the Senate Conference Committee.

Schmitt testified regarding the problems involved in basing apportionment on total population, citizen population or eligible voters as against registered voters. He made the following points: Detailed information regarding registered voters is readily available for each representative district. (R. 221) Such is not the case with citizen population and eligible voters. (R. 220) Figures on citizen population and eligible voters can be estimated for the State as a whole and for each county, but not for election districts. Even in the case of total population, figures are not available for election districts because census enumeration is made by census tracts which seldom coincide with election district boundaries. (R. 219) Another problem with the use of total population as apportionment base is the presence of military personnel and their dependents. In 1960, military personnel and their dependents in Hawaii numbered 112,938 out of the total State population of 632,772. (Ex. 15, Table 1, R. 260, 379) Military personnel and their dependents are concentrated almost entirely on Oahu. (Ex. 15, Table 3, R. 381), and in parts of Oahu where military installations are concentrated. (Ex. 17, R. 261) A vast majority of them do not have the residential requirement for voting. It is possible to create an election district composed entirely of military personnel and their dependents without a single registered voter in the district. (R. 275)

Schmitt also testified regarding problems connected with districting. He stated that it is not an easy matter to carve out an election district composed of a homogeneous group even in designing a single member representative district. (R. 225) He was of the opinion that senatorial districts delineated in H. B. No. 987 was well thought out "on the basis of substantial equality of the number of registered voters, on the use of long-standing statistical and taxation and land division boundaries, on contiguity and compactness." (R. 317) He also expressed his

view on multi-member districts, by referring to the law of large numbers and stating that a small area with a large number of small districts would be subject to considerable fluctuation in short period of time in the number of registered voters, whereas a small number of large districts would be subject to much less fluctuation in the number of registered voters. (R. 318)

Lota testified to the effort made by the office of the clerk of the City and County of Honolulu, as well as by the office of the clerk of each of the other counties, to register as many eligible voters as possible. Her testimony showed that her office is open for registration throughout the year, except for 30 days before primary elections, and 10 days before general elections and special efforts are made to encourage registration before elections. (R. 277) For instance, before the 1960 elections, she deputized 200 volunteer registrars. (R. 278) These volunteers were stationed at various points on Oahu, and the places and hours of registration were made known throughout the community by distribution of information sheet (Ex. B, R. 279, 402) and by newspaper advertisements. (R. 278) These volunteers were available from June 1 to the elections in October and November. (R. 279)

Lota also testified regarding the registration of military personnel and their dependents. According to her testimony, military personnel and their dependents are required to live off base to establish their voting residence; their period of required residence does not begin to run until their intention to reside permanently in Hawaii is entered in their service records; otherwise, the requirements for their registration are identical with the requirements applicable to civilian registrants (R. 280); and her office always registered military personnel who showed the necessary qualifications. (R. 285)

Takahashi testified regarding the discussion in the Conference Committee which led to the decision to have five multi-member senatorial districts on Oahu and one multi-member senatorial district on Hawaii. On Oahu 5-senator districts were considered and dropped because a district with five senators would have 20 percent representation, which was thought to be too large for any district. A plan to establish senatorial districts along traditional and well defined geographical lines was also

discussed and dropped because such plan would result in the senatorial districts having the same boundaries as the representative districts. So, the final plan was agreed upon which left only one senatorial district with the same boundaries as the representative district. (R. 299) With reference to the island of Hawaii, Takahashi testified that it was decided to have one senatorial district with three senators because the present second senatorial district, with 7,000 registered voters, was considered too small for a separate senatorial district. (R. 304) The legislators did not favor single member districts for the senate nor even two-member districts. Such districts were considered too small and conducive to localized thinking. (R. 295, 297, 298)

After the entry of the April 28, 1965, decision and order, Governor Burns and intervenors-defendants appealed to this Court. Plaintiffs did not appeal. Plaintiffs' principal objective of having proper representation in the senate for Oahu will be accomplished by the order requiring the convening of a constitutional convention, which will not be limited to a consideration of senatorial reapportionment but may consider other subjects, including reapportionment of the house of representatives. However, plaintiffs' failure to appeal is not based on their total agreement with the decision and order. Inasmuch as the case is on appeal, they participate therein and respectfully state their position on the questions presented on the appeal. Their position on the questions presented, other than on the validity of the use of registered voters as the basis of reapportionment, may be inconsistent with their failure to appeal. Nevertheless, they state their position on the premise that in a reapportionment case they may point out errors, despite their failure to appeal, so that this Court may determine the basic standards and state the applicable guidelines. *Reynolds* v. *Sims*, 377 U. S. 533, 559.

ARGUMENT

I. APPORTIONMENT OF SEATS IN THE LEGISLATURE OF THE STATE OF HAWAII ON THE BASIS OF REGISTERED VOTERS DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE CONSTITUTION OF THE UNITED STATES.

Plaintiffs contended in the district court that the use of registered-voter basis for apportionment results in a grossly unfair weighting of both houses of the legislature in favor of the lesser populated areas of the State. (R. 8) However, under the evidence adduced at the hearings, they accede to the holding of the district court that in Hawaii the use of registered voters as a basis of apportionment does not operate to minimize or cancel out the voting strength of any element of the voting population. (R. 75)

In *Reynolds* v. *Sims*, 377 U. S. 533, 568, this Court held that "as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis," and that "an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State."

In *WMCA, Inc.* v. *Lomenzo*, 382 U. S. 4, this Court in effect held that apportionment on the basis of citizen population, namely, total population less aliens, meets the requirements of the Equal Protection Clause by affirming the decision of the district court in the same case reported in 238 F. Supp. 916.

This Court's affirmance of *WMCA, Inc.* v. *Lomenzo* also included affirmance of the district court's rejection of the votes cast in the 1962 New York gubernatorial election as a basis of apportionment. However, the district court's rejection in that regard was based on the court's conclusion that the voter basis was used to perpetuate, and was but a ghost of, prior malapportionment.

In *Buckley* v. *Hoff*, 243 F. Supp. 873, the district court held that Vermont reapportionment, which reapportioned the senate on total residents basis along county lines and the house of rep-

resentatives on registered voter basis along town lines met Federal constitutional requirements. The decision in the case was written by Judge Waterman, who wrote the district court decision in *WMCA, Inc.* v. *Lomenzo*. In the decision, Judge Waterman referred to the following statement in *Reynolds* v. *Sims*, 377 U. S. 533, 577:

> "By holding that as a federal constitutional requisite both houses of a state legislature must be apportioned on a population basis, we mean that the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable. We realize that it is a practical impossibility to arrange legislative districts so that each one has an identical number of *residents*, or *citizens*, or *voters*. Mathematical exactness or precision is hardly a workable constitutional requirement." (Emphasis supplied)

Ellis v. *Mayor of Baltimore*, 234 F. Supp. 945, 953, contains a statement that a careful reading of *Reynolds* v. *Sims* makes it clear that "the basic constitutional protection is one of equal representation by population, and not equal representation by registered voters." However, in that case, the reapportionment did not meet the requirements of the Equal Protection Clause, under either basis, population or registered voters.

In Hawaii, the apparent underrepresentation of certain districts on population basis is due to the presence of military personnel and their dependents. There is no discrimination against them in voting registration. (R. 285) Most of them simply do not meet the residential requirement because of the temporary nature of their stay.

The effect of the presence of military personnel and their dependents may be shown by considering the Tenth and Eleventh Representative Districts, which, according to Exhibit 1 (R. 202, 339) are the most underrepresented districts on population basis. All of the major military installations are in those districts, except Kaneohe Marine Base, which is in the Eighth Representative District. (Ex. 17, R. 261)

	Population 4-1-60	Representatives on Population Basis	Registered Voters 11-1-60	Representatives on Registered Voter Basis
Tenth District	95,118	8	17,003	4
Eleventh District..	57,743	5	12,553	3
	152,861	13	29,556	7

Total population of State (Ex. 1, R. 202, 339)	632,772
Number of representatives	51
Average population per representative	12,407
Population represented by 7 representatives	86,849
Population not represented (152,861—86,849)	66,012

The total number of military personnel and their dependents in Hawaii in 1960 was 112,938, of whom 60,057 were dependents. (Ex. 15, R. 260, 379) The unrepresented population of 66,012 can be fully accounted for by the presence of military personnel and their dependents in those districts.

In *Davis* v. *Mann*, 377 U. S. 678, 691, in answer to the argument that underrepresentation was caused by the presence of military and military related personnel, this Court stated: "Discrimination against a class of individuals, merely because of the nature of their employment, *without more being shown*, is constitutionally impermissible." (Emphasis supplied)

Eileen Lota's testimony showed that in Hawaii there is no discrimination against military personnel and their dependents, that they are entitled to registration if they meet the requirements other citizens are required to meet.

II. ELECTION OF MEMBERS OF BOTH HOUSES OF THE LEGISLATURE OF HAWAII FROM SINGLE-MEMBER AND MULTI-MEMBER DISTRICTS OF VARYING SIZES DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE CONSTITUTION OF THE UNITED STATES.

A. *Multi-member districts are constitutionally permissible.*

In *Lucas* v. *Forty-Fourth General Assembly of Colorado*, 377 U. S. 713, 731, n. 21, this Court, although critical of the multi-member districting in proposed Amendment No. 8 to the Colorado Constitution which provided for the election of 8 senators and 17 representatives from Denver, stated: "We do not inti-

mate that apportionment schemes which provide for the at large election of a number of legislators from a county, or any political subdivision, are constitutionally defective. Rather, we merely point out that there are certain aspects of electing legislators at large from a county as a whole that might well make the adoption of such a scheme undesirable to many voters residing in multimember counties."

In *Forty-Fourth General Assembly of Colorado* v. *Lucas*, 379 U. S. 693, this Court vacated the judgment of the district court reported in 232 F. Supp. 797, insofar as the judgment decided non-Federal questions in the light of the decisions of the Colorado Supreme Court in *White* v. *Anderson*, 394 P. 2d 333, which held that subdistricting of a county violates the Colorado constitution. This in effect is a holding that Colorado may have multi-member districts for both houses.

In *Fortson* v. *Dorsey*, 379 U. S. 433, this Court held that multi-member districting in Georgia's 1962 Senatorial Reapportionment Act is not per se unconstitutional, although it added a caveat that "our opinion is not to be understood to say that in all instances or under all circumstances such a system as Georgia has will comport with the dictates of the Equal Protection Clause."

In *Burnette* v. *Davis*, 382 U. S. 42, this Court affirmed the decision in *Mann* v. *Davis*, 245 F. Supp. 241, which approved the consolidation of Richmond and Henrico County into a single multi-member district electing 8 delegates to the Virginia House of Delegates.

In *Buckley* v. *Hoff*, 243 F. Supp. 873, the district court found no constitutional infirmity in the Vermont reapportionment which provided the following representation:

Senate—30 senators

2 single member districts electing	1 senator each
6 multi-member districts electing	2 senators each
2 multi-member districts electing	3 senators each
1 multi-member district electing	4 senators
1 multi-member district electing	6 senators

House of Representatives—150 representatives

36 single member districts electing	1 representative each
22 multi-member districts electing	2 representatives each
6 multi-member districts electing	3 representatives each
3 multi-member districts electing	4 representatives each
2 multi-member districts electing	5 representatives each
1 multi-member district electing	6 representatives
1 multi-member district electing	9 representatives
1 multi-member district electing	15 representatives

In *Butcher* v. *Bloom*, 415 Pa. 438, 467, 203 A. 2d 556, 572, the Pennsylvania Supreme Court stated that the creation of multi-member districts, of itself, would not violate the Federal Constitution simply because the voters in a particular district would vote for two or more legislators while those in another district would vote for a lesser number. However, it stated that a legislative scheme which creates single-member districts and multi-member districts in an arbitrary manner would be objectionable.

Multi-member districts comport not only with constitutional requirements but also with democratic process. In an article entitled: "A New Look at Constituencies: The Need for a Recount and a Reappraisal," in 49 American Political Science Review 1105 (1955), Maurice Klain reported that in 1954 out of 1,841 senate seats in the United States 221, or about 12 percent were contested in multi-member constituencies, and out of 5,762 seats in the lower houses 2,616, or about 45 percent, were so contested, and wrote:

> "The multiple district is no departure from the good old days and the tried old ways. It is not, as the giants of the type might lead one nowadays to think, a makeshift arrangement inspired by urban agglomerates. Neither the multiple district nor its widespread use is an emergent of recent times. It is the single member district that stands outside of history, an alien to the past, a new-fangled and upstart thing.
>
> "* * * * *
>
> "* * * In 1951 a special committee of the [American Political Science] Association, reporting a study made for

federal agencies, referred to one-member elections as 'this desirable requirement,' apparently on the assumption that single districts yield the more democratic representation. Where is the evidence? Is apportionment more nearly equal in, say, New York than Massachusetts, Wisconsin than Illinois, California than Washington?[1] The supreme court of New Jersey concluded years ago that single districts, compared to multiple, provide greater opportunities and temptations to gerrymander. More recently political scientists have suggested, unfortunately without proof, that equal representation is technically more feasible with multiple districts. Comparative studies would clearly be useful.

"Such studies, moreover, should interest the friends of party government. In political debate critics and champions have agreed that one-member elections work against party cohesion. * * *. The single district, critics say, is the answer to a pressure group's prayer. The representative for such a district, they contend, is more at the mercy of factional power than the several spokesmen for a multiple district. Upon him alone the group concentrates its fire. He is a lone wolf soon made into a sitting duck. * * *. What is more, critics argue, the representatives tend to develop a narrowness of outlook, a preoccupation with local concerns, a passion for logroll and the pork barrel.

* * *

"Champions of the single district, on the other hand, claim that the voter's control is strengthened, his power of choice enhanced. They rejoice that one-member elections break up 'caucus combinations' and focus attention upon 'the man rather than the party.' For this reason, they insist, 'better' men enter the race and win. Earlier, Montesquieu offered a similar argument, asserting that single districts encourage the electorate to choose with discrimination.

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[1] At the time of this study, California, Delaware, Kansas, Kentucky, Missouri, Nebraska, New York, Rhode Island and Wisconsin elected all legislators from single member districts.

Nowadays good government reformers as well as the textbooks echo this assertion.

"It has not gone unchallenged. Bryce, Luce, and other competent observers have testified that multiple districts, embracing sizeable constituencies, are the more likely to recruit men of breadth and eminence—men who may be passed over or repelled by the triviality and localism of single-district politics. * * *"

B. *Multi-member districting in H. B. No. 987 is not arbitrary.*

In the State of Hawaii the counties of Hawaii, Maui and Kauai, and the City and County of Honolulu are physically separated. (R. 57) Historically also, the four major islands have constituted separate political units. (R. 64) Consequently, it is logical to constitute each of the counties of Hawaii, Maui and Kauai as separate senatorial districts.

The consolidation of existing first and second senatorial districts on the island of Hawaii into one senatorial district electing three senators, instead of retaining the existing districting with two senators apportioned to the first senatorial district and one senator apportioned to the second senatorial district, is a political decision without constitutional implication. It was done because the number of registered voters in the existing first senatorial district is too large for two senators and the number of registered voters in the existing second senatorial district is too small for one senator, and the legislators decided to "equalize the figures." (R. 305) This is identical with the procedure used in Virginia when Richmond was combined with Henrico County. Richmond had sufficient population for 5 delegates but not enough for 6; Henrico County had enough for 2 but not enough for a third. So, they were combined into a multi-member district of 8 delegates. *Mann* v. *Davis*, 245 F. Supp. 241.

With reference to the districting on Oahu, the testimony of Schmitt was that "on the basis of substantial equality of the number of registered voters, on the use of longstanding statistical and taxation and land division boundaries, on contiguity and compactness, the districts seemed to be well thought out."

The district court was critical of the proposed senatorial reapportionment on Oahu because it ignored ethnic, political,

industrial, economic, social, and occupational factors, and community of interests and problems. (R. 156)

Under a guideline laid down by this Court, such factors cannot be considered. In *Reynolds* v. *Sims*, 377 U. S. 533, 579, this Court stated that "neither history alone, nor *economic or other sorts of group interests*, are permissible factors in attempting to justify disparities in population-based representation." (Emphasis supplied) That this proscription applies not only in connection with attempts to justify disparities in representation but generally in connection with districting may be inferred from Mr. Justice Stewart's dissent in *Lucas* v. *Forty-Fourth General Assembly of Colorado*, 377 U. S. 713, 749.

The district court referred to Schmitt's testimony that the proposed fifth senatorial district encompassed a highly heterogeneous area containing "a multitude of Caucasian widows in the upland area, and an overabundance of Filipino males in the seaward portion of the district." (R. 157) By this reference, did the court mean that the legislature should have carved out one single-member district to give representation to Caucasian widows in the upland area and another single-member district to give representation to Filipino males in the seaward portion? If so, it runs counter to *Gomillion* v. *Lightfoot*, 364 U. S. 339.

In *Mann* v. *Davis*, 245 F. Supp. 241, one of the parties advanced a contention which was *Gomillion* in reverse. He objected to the consolidation of Richmond and Henrico County because the consolidation reduced the relative political strength of the colored population of Richmond, and objected to the creation of a multi-member district encompassing the two areas because, if Richmond had been divided into five single-member districts, the colored population of Richmond could have elected one or more delegates to the House of Delegates. The district court rejected the contention and this Court affirmed. *Burnette* v. *Davis*, 382 U. S. 42.

Under another guideline of this Court, political subdivision lines, and natural or historical boundary lines, may be used in establishing state legislative districts to prevent gerrymandering and provide compact districts of contiguous territory. *Reynolds* v. *Sims*, 377 U. S. 533, 578. This rules out interest representation.

Political scientists say that diversity of interests is preferable to homogeneity in a political unit. In Seymour Martin Lipset's *Political Man* (1959), 86-91, it is stated that a system in which the support of different parties corresponds too closely to basic social divisions would reflect a state of conflict so intense and clear-cut as to rule out compromise and threaten the foundations of democracy, and that the chances of stable democracy are enhanced to the extent that groups and individuals have a number of cross-cutting, politically relevant affiliations. Paul Ylvisaker in an article entitled, *Some Criteria for A "Proper" Areal Division of Governmental Powers,* in Arthur Maass' *Area and Power: A Theory of Local Government* (1959), lays down the maxim that "The component areas should be constituted of sufficient diversity of interests to ensure effective debate within each component and transcending communities of interest among the several components."

The district court attributed the legislature's insistence on multi-member districting, despite the intimation of the court that such would not be acceptable, to the desire of the senators for self-preservation. Evidence is otherwise, except for the inference that may be drawn from the fact that a number of senators live in close proximity to each other, posing a possibility of head-on contest if single member districting were adopted. Be that as it may, the motive of the legislature is immaterial in judging the constitutionality of its act. *United States* v. *Des Moines Navigation and Railway Company,* 142 U. S. 510, 544; *Otis* v. *Parker,* 187 U. S. 606, 608.

In *United States* v. *Des Moines Navigation and Railway Company,* this Court quoted with approval the following statement from Cooley's *Constitutional Limitations,* 5th ed., 222:

> "From what examination has been given to this subject, it appears that whether a statute is constitutional or not is always a question of power; that is, a question whether the Legislature in the particular case, in respect to the subject matter of the Act, the manner in which its object is to be accomplished, and the mode of enacting it, has kept within the constitutional limits and observed the constitutional conditions. In any case in which this question is answered in the affirmative, the courts are not at liberty to inquire

into the proper exercise of the power. They must assume that legislative discretion has been properly exercised. * * *. And, although it has sometimes been urged at the bar that the courts ought to inquire into the motives of the Legislature where fraud and corruption were alleged, and annul their action if the allegations were established, the argument has in no case been acceded to by the judiciary, and they have never allowed the inquiry to be entered upon."

III. THE LEGISLATURE OF THE STATE OF HAWAII IS ENTITLED TO AN OPPORTUNITY TO FASHION A REAPPORTIONMENT PLAN COVERING BOTH HOUSES OF THE LEGISLATURE, IF THE PLAN FOR THE REAPPORTIONMENT OF THE SENATE IN H. B. NO. 987, CONSIDERED TOGETHER WITH THE EXISTING APPORTIONMENT OF THE HOUSE OF REPRESENTATIVES, VIOLATES THE EQUAL PROTECTION CLAUSE OF THE CONSTITUTION OF THE UNITED STATES.

Plaintiffs contended in the district court that the apportionment plan covering both the senate and the house of representatives of the State legislature is an integrated overall scheme for legislative representation, that the portion of the plan covering the house of representatives is not severable from the portion covering the senate, and that the invalidity of the apportionment of the senate invalidates that of the house of representatives. (R. 4, 66)

This contention was in accordance with the holding in *Maryland Committee* v. *Tawes*, 377 U. S. 656, 673, where this Court stated:

"* * * in reviewing a state legislative apportionment case this Court must of necessity consider the challenged scheme as a whole in determining whether the particular State's apportionment plan, in its entirety, meets federal constitutional requisites. It is simply impossible to decide upon the validity of the apportionment of one house of a bicameral legislature in the abstract, without also evaluating the actual scheme of representation employed with respect to the other house. Rather, the proper, and indeed indispensable, subject for judicial focus in a legislative apportion-

ment controversy is the overall representation accorded to the State's voters, in both houses of a bicameral state legislature."

The district court rejected plaintiffs' contention in its decision and order of February 17, 1965, (R. 66) and, pursuant to its finding of invalidity of the plan of senatorial apportionment provided in the State constitution (R. 65), ordered the convening of a constitutional convention and retained jurisdiction to "judicially reapportion the Senate in the event that the electors of Hawaii reject a constitutional convention, or the convention fails to propose an amendment reapportioning the Senate, or the electors reject such an amendment. * * *"

The motion of the intervenors-defendants to amend and alter followed. (R. 83) The court granted the motion, and ordered legislative reapportionment of the senate on the basis of the number of voters registered at the 1964 general election. (R. 89) Here, the thing that should be particularly emphasized is that the motion of the intervenors-defendants covered the reapportionment of the senate only and the court order covered the senate only. Consequently, the legislature deliberated solely on the question of senatorial reapportionment and gave no consideration to reapportionment of the house of representatives. (R. 297)

While the legislature was deliberating on the question of reapportionment, the court released its memorandum which indicated that any plan for the election of senators from multi-member districts, except possibly "one or two 2-member districts in the neighbor islands," was doomed. (Governor Burns' Brief, Appendices, 28a) Neither in that memorandum nor in any other manner did the court indicate to the legislature that it should or could consider the reapportionment of the house of representatives.

Plaintiffs submit that the district court erred in its holding in its February 17, 1965, decision and order that the house of representatives was constitutionally apportioned, independently of the apportionment of the senate. After announcing its decision the court had some very serious qualms about it. This is shown in Judge Beeks' statement at the hearing on the approval of H. B. No. 987: "Speaking solely for myself, I am beginning

to have great doubts as to whether we were right in the first place." (R. 311) It is also shown in the following statements in the April 28, 1965, decision and order:

> "Although we initially determined that the house of representatives was not unconstitutionally apportioned, by that decision we did not say that those representative districts had been perfectly laid out. We agree with Mr. Schmitt that, compared to the makeup of all other representative districts in the State, the 15th is too large. * * * (R. 158)
>
> * * * * * *
>
> "In reapportioning and redistricting the senate, both houses overlooked the fact that, to be valid, the makeup of the senate must positively complement the makeup of the house, to provide the vital equality of voter representation. * * * (R. 159)
>
> * * * * * *
>
> "* * * because both houses failed to look at the political scene in its totality and instead viewed the reapportionment scheme of the senate as if it were something that could be fashioned without consideration of its tight juxtaposition to the house of representatives, each house of the legislature jointly and separately took such a myopic view of the political problem involved, that they failed to see and anticipate the overall result of arbitrarily joining their independently constructed senatorial plan with the existing representative scheme. * * *" (R. 162)

In *Fortson* v. *Toombs*, 379 U. S. 621, 625, Mr. Justice Harlan alludes to the lower courts ranging "so far afield as to hamstring state legislatures." In Hawaii, the legislature was so hamstrung into considering the senatorial reapportionment on the court's terms.

In its April 28, 1965, decision and order, the court stated: "This court indicated the means by which the senate could be apportioned to give every voter the equal protection and equal representation that he is entitled to without disturbing the makeup of the house." (R. 162) The reference obviously is to the memorandum that multi-member districts would be frowned upon.

The effect of that memorandum was to reduce the legislature to a position of being merely an administrative arm of Federal judiciary to delineate senatorial district boundary lines, instead of being an independent, deliberative body of a sovereign state, for it, in effect, said: "We decided that the house of representatives is apportioned constitutionally. So, leave it alone. If the house is left alone, the only way to reapportion the Senate is to have the senators elected from single-member districts. We may allow one or two 2-member districts on the other islands, but we see no reason for allowing any multi-member district on Oahu."

That left the legislature no choice. Nevertheless, the legislature, as an independent deliberative body answerable to the people of Hawaii, deliberated and came out with a plan which Schmitt testified was "well thought out" and which, plaintiffs submit, is thought out better than the existing plan for the house of representatives.

If the creation of large multi-member districts brings about invidious discrimination against the voters of the small districts, such discrimination will result not from the senate reapportionment in H. B. No. 987, but from the existing house apportionment, which shows a wider spread in representation from the representative districts than the spread in the proposed plan for the senate.

While plaintiffs maintain, as stated above, that the district court erred in holding the apportionment of the house of representatives constitutional independently of the apportionment of the senate, it is not their position that the existing house apportionment, in fact, fails to meet constitutional standards. Plaintiffs submit that there is no constitutional infirmity in the apportionment consisting of the existing house apportionment and the senate reapportionment proposed in H. B. No. 987, and that the district court should have approved H. B. No. 987, together with H. B. No. 773 and H. B. No. 986.

However, if this Court should decide that such package does not comport with Federal constitutional requirements, then it is submitted that the State legislature should be given an opportunity to reconsider the existing apportionment of the house of representatives and come up with a plan covering both houses of the legislature. The legislature has not yet had such opportunity.

It may be that the February 17, 1965, decision and order has frozen the attitude of the house members. However, it must be assumed that legislators are reasonable men.

CONCLUSION

For the foregoing reasons, the case should be remanded to the district court (a) to approve H. B. No. 987, together with H. B. No. 773 and H. B. No. 986, or (b), if this Court should decide that the apportionment of the legislature, consisting of the existing apportionment of the house of representatives and the senate reapportionment proposed in H. B. No. 987, violates the Equal Protection Clause of the Constitution of the United States, to order that the legislature fashion a reapportionment plan covering both houses of the State legislature to be used for the 1966 election and to remain in effect until superseded by constitutional amendment, and also a proposed constitutional amendment for reapportionment of both houses of the legislature to be submitted to the electorate for ratification.

Respectfully submitted,

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January 19, 1966

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

Nos. 512, 535 AND 619

JOHN A. BURNS, GOVERNOR OF THE STATE OF HAWAII, *Appellant,*

v.

WILLIAM S. RICHARDSON, *et al.,* *Appellees.*

ELMER F. CRAVALHO, *et al.,* *Appellants,*

v.

WILLIAM S. RICHARDSON, *et al.,* *Appellees.*

KAZUHISA ABE, *et al.,* *Appellants,*

v.

WILLIAM S. RICHARDSON, *et al.,* *Appellees.*

ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

SUPPLEMENTAL BRIEF FOR PLAINTIFFS-APPELLEES

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965
Nos. 318, 323 AND 409

JOHN A. BURNS, Governor of the State of Hawaii,
Appellant,

v.

WILLIAM S. RICHARDSON, *et al.*,
Appellees.

ELMER F. CRAVALHO, *et al.*,
Appellants,

v.

WILLIAM S. RICHARDSON, *et al.*,
Appellees.

KAZUHISA ABE, *et al.*,
Appellants,

v.

WILLIAM S. RICHARDSON, *et al.*,
Appellees.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

SUPPLEMENTAL BRIEF FOR PLAINTIFFS-APPELLEES

SUPPLEMENTAL BRIEF FOR PLAINTIFFS-APPELLEES

Plaintiffs-appellees file this supplemental brief to present to this Court the case of *Toombs* v. *Fortson*, 241 F. Supp. 65 (N.D. Ga., April 1, 1965) as additional authority.

In that case the district court had under consideration:

(a) the reapportionment of the Georgia senate effected by Georgia Laws 1962, Special Session, pp. 7-31; and

(b) a plan for the reapportionment of the Georgia house of representatives proposed in House Bill No. 367 of the 1965 session of the General Assembly and printed in Acts of 1965, p. 127, Georgia Code Annotated, §47-101.

In its deliberation the court noted that the litigation had been "marked by a desire on the part of the state to manage its own affairs to the end of bringing its apportionment in line with constitutional standards" and that substantial progress toward the goal of fair representation had been made.

However, the court held that the apportionment of both houses continued to violate the Equal Protection Clause and must be corrected. That, the court stated, left the "question of when and how."

On the question of *when*, the court set the time limit for corrective action at the end of the 1967-1968 regular session of the General Assembly, or May 1, 1968, whichever may be the earlier, by approving the existing reapportionment of the senate and the proposed reapportionment of the house of representatives for use as interim measures and withholding any action in the case until such time.

On the question of *how*, the court decided that corrective action should be taken "if possible, by the state and not by the court," and be accomplished "within the ambit of the public interest that is involved in allowing the state political and governmental process to function in a manner so as to do as little harm as possible to other areas and functions for which the state is responsible." *Toombs* v. *Fortson*, supra, 71.

Thus, the case supports:

(a) Part III on pages 22-26 of plaintiffs-appellees' brief where it is argued that the legislature of the State of Hawaii is entitled to an opportunity to fashion a reapportionment plan covering both houses of the legislature, if the plan for the reapportionment of the senate in H. B. No. 987, considered together with the existing apportionment of the house of representatives, violates the Equal Protection Clause; and

(b) Part I-D-5 on pages 95-96 of Governor Burns' brief, part V on pages 75-80 of the brief for Kazuhisa Abe, et al., and part I-C on pages 46-48 of the brief for Elmer F. Cravalho, et al., where it is argued that the district court improperly imposed an injunction against the legislators from taking any legislative action, except such as were necessary to organize the respective houses and appropriate funds for the session, until reapportionment legislation satisfactory to the court had been enacted.

Respectfully submitted,

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February 1, 1966

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In the

Supreme Court of the United States

October Term, 1965

Nos. 318, 323 and 499

JOHN A. BURNS, Governor of the State of Hawaii, *Appellant,*

—*v.*—

WILLIAM S. RICHARDSON, *et al.,* *Appellees.*

ELMER F. CRAVALHO, *et al.,* *Appellants,*

—*v.*—

WILLIAM S. RICHARDSON, *et al.,* *Appellees.*

KAHUHUA AEA, *et al.,* *Appellants,*

—*v.*—

WILLIAM S. RICHARDSON, *et al.,* *Appellees.*

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

REPLY BRIEF FOR JOHN A. BURNS, GOVERNOR OF THE STATE OF HAWAII

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February 1966

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IN THE

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OCTOBER TERM, 1965

Nos. 318, 323 and 409

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Appellees.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

REPLY BRIEF FOR JOHN A. BURNS, GOVERNOR OF THE STATE OF HAWAII

In this reply brief we shall briefly touch on some of the more important respects in which the briefs filed on behalf of certain of the Hawaii State Senators (Abe, *et al.*),[1] certain of the State Representatives (Cravalho, *et al.*),[2] Lieutenant Governor Richardson,[3] and the original plaintiffs in this action[4] do not meet certain of the basic points which we urged in our opening brief.

I. THE ERRORS OF THE DISTRICT COURT

A. The District Court Erred in Affirmatively Holding That the Remaining Provisions of Article III Were "Constitutional and Valid" Despite the Presence of the Unconstitutional Provisions Fixing the Number of Senators Per District.

1. It is important here to remember the exact nature of the District Court's action of which we complain. In its opinion and order of February 17, 1965, the District Court affirmatively held that, despite the unconstitutional provisions of Article III, Section 2, fixing the number of Senators per Senatorial District, the other provisions of Article III were "constitutional and valid." (R. 79-80; 238 F.Supp., at 478-79)—Thus, the question is not, as the Cravalho brief suggests, whether it was proper for the District Court to express its views on certain of the substantive provisions of the Hawaii apportionment scheme after it had held a material portion of that scheme invalid. (Cr. Br. 48-49) We take no issue with this as a matter of principle, al-

[1] Cited "Abe Br."

[2] Cited "Cr. Br."

[3] Cited "Ric. Br."

[4] Cited "Pl. Br."

though we believe that some of the views which the District Court expressed were erroneous, and that in general a District Court should forbear from *any* action that will practically narrow the range of constitutionally permissible alternatives available to the formulation of an effective reapportionment plan.[5]

The point is, rather, that the District Court went beyond simply stating its views as to the constitutionality of various features of the apportionment scheme in Hawaii. It undertook, instead, to make an affirmative declaration that the remainder of the Article dealing with the composition of the Legislature was "constitutional and valid." This is, as we demonstrated in our opening brief, pp. 30-31, in flat conflict with this Court's decisions. Among other vices is the substantial degree of inflexibility this action introduced into any attempt to cure the defects which had been found in the State's apportionment scheme.

A vivid demonstration of how this in fact worked in the case of the Legislature's attempts to reapportion the Senate is furnished by the Abe brief itself. (Abe Br. 43-46) Thus, the Abe brief makes it clear—as indeed we have urged[6]—that the determinative factors in the Legislature's Senate reapportionment plan of April, 1965, rejected by the District Court, were the very provisions of the existing

[5] Indeed, despite the fact that we contend that there is no basis for affirmatively upholding any portion of the State's apportionment scheme at this juncture, we have, of course, urged from the District Court and, on appeal, from this Court, expressions as to the constitutionality of certain of the features of the existing scheme, like its use of the "registered voters" measure, and the peculiar combination of single and multimember districting that is used in the Hawaii House and which was used in the proposed Senate plan.

[6] Opening Br., pp. 39-40.

apportionment scheme which the District Court had affirmatively upheld. Thus, that brief attempts to justify the choice of multimember districts for the Senate on the basis that the use of single-member districts would have created Senate Districts smaller than the House Districts, which was contrary to the particular purposes of bicameralism in Hawaii. (Abe Br. 43) But this, of course, is so only because the apportionment plan in the House—which the Legislature took as a "given" factor in the situation—itself made extensive use of multimember districts.

Likewise, the Legislature's insistence on using the 25-member figure for the number of Senators—a detail of the pre-existing apportionment scheme also affirmatively upheld by the District Court—shaped the course of the plan that was proposed in April 1965; for it meant that single-member districts in the Senate would be smaller than the House multimember districts. Indeed, the very attempt of the Abe brief to use the 25-member starting point as a justification for the Senate plan demonstrates the inseverability of the matters which the District Court held to be severable. Thus the Abe brief states (Abe Br. 46): "The Hawaii Legislature accepted the 25-member figure of the Senate as its starting point. This acceptance was in itself a judgmental decision." The brief neglects to say that it was a starting point which the District Court, in effect, had mandated, and one which, at least in terms of a provisional plan, it could accordingly be said the Legislature had no power to change, under the form of the District Court's order.

2. The appellees in No. 318 attempt two other justifications for the District Court's affirmative decree declaring the various details of Article III "constitutional and valid."

First, they suggest that, since various of the elements of the apportionment scheme are arguably inoffensive when taken in themselves, they must also be constitutionally inoffensive when taken in the aggregate. (Abe Br. 89-95) But this misses the point. For example, our argument is not that there is anything intrinsically wrong with having 25 State Senators; but that, if this leads to an apportionment which uses an arbitrary multimember districting system, compounding the representational problems in the House of Representatives, it is part and parcel of a plan as unconstitutional as the original Senate apportionment system; and that in any event it is a factor which should not be inflexibly enshrined in any reapportionment by an affirmative decree of the District Court.

3. Secondly, as an alternative argument on this point, several of the appellees in No. 318 (Abe Br. 86-87; Cr. Br. 50) urge that the District Court's error in affirmatively upholding the constitutionality of the remaining provisions of the legislative apportionment Article was at most "harmless error" or that it was in effect "cured" through the Legislature's adoption of the Senate plan. In the first place, of course, this argument assumes that the District Court erred in rejecting the Legislature's Senate plan, a proposition which the appellees then seek to uphold, and which we, of course, dispute.

But even if the Senate plan had met constitutional tests, it does not follow that the District Court's action in affirmatively upholding the details of the existing scheme was harmless error. For, if it erred in narrowing the choices available to the Legislature (or to itself) in adopting a provisional plan, its erroneous action will have had a per-

manent effect on the structure of the reapportioned Hawaii Legislature; it must be remembered that any provisional plan will be the starting point for a permanent plan. If there is one thing which the briefs of the appellees make plain, it is that the Legislature in developing its Senate reapportionment plan was confined by the existing provisions of the House apportionment and the other features of Article III of the State's Constitution which the District Court affirmatively upheld in its February order. Had the Legislature not been so restricted, as we contend, through the erroneous action of the District Court, the plan which emerged might well have been entirely different. (See Opening Br., pp. 37-42)

Thus, even if the Legislature's Senate plan had been constitutional, the error of the District Court's February order obviously would not have been harmless error. It would have affected the entire subsequent course of events. It would have been a material factor in the determination to use one plan rather than another. If the District Court erred in affirmatively upholding in its February order the details of Article III apart from the numbers of Senators per district, the only relief that could ever be effective would be a remand by this Court, under appropriate general guidelines, which would leave the State free to adopt a provisional plan that might readjust any of the features of the apportionment system, in both houses, to the extent appropriate to reach not only a minimally constitutional but a sound and wise overall result. Any other course would be an unwarranted invasion by the courts of the functions which should be exercised in the first instance by the Hawaii State authorities.

B. The District Court Erred in Sanctioning the "Registered Voters" Measure of Representation in Hawaii.

1. On this issue, too, the briefs of the appellees in No. 318 do not uniformly state with precision the real issue before the Court. (See, *e.g.*, Cr. Br. 51-58; Pl. Br. 13-15) The issue is *not* whether a state may exclude military and military-dependent personnel, or certain classes of military personnel, from the apportionment measure—although our position on this question, to the extent it may be peripherally involved, is that the state may not, as taught by *Davis v. Mann*, 377 U.S. 678, 691 (1964).[7] The measure of apportionment used in the Hawaii House of Representatives—and in the Senate plan rejected on other grounds by the District Court—is, purely and simply, a "registered voters" measure. As such, it is completely different from a population measure: for one thing, it includes less than one-third of the people that a population measure would include. (R. 55) And, in any event, as we demonstrated in our opening brief (pp. 63-64), a "civilian population" measure does not produce results similar to the "registered voters" measure.[8] Thus, Hawaii's use of the "registered voters"

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[7] Thus the elaborate argument in the Cravalho Brief, Cr. Br. 51-58, likening the exclusions here to the exclusion of aliens from the apportionment base, totally misses the point. In 1960 there were about 202,000 registered voters of a total population of 633,000 in the State. (R. 55) More than "exclusion" in any meaningful sense is involved.

[8] The Cravalho Brief suggests that if the *districts* in which there are substantial military populations are omitted, there is a substantially constant ratio between "registered voters" and "civilian population." (Cr. Br. 56) But even doing so there is a deviation between a high of 48% and a low of 36%, or about one-fourth. And more fundamentally, the point is that the civilian population in the districts where there are many military personnel cannot be disregarded; what we examined in our opening brief in each district was the ratio between registered voters and *civilian population*.

measure must stand or fall in itself, without reference to any attempted justification from the arguments as to the significance of the presence of a substantial military population in the state.[9]

So eager are certain of the appellees in No. 318 to justify the "registered voters" measure simply on the basis of the substantial number of military installations in Hawaii, that they indulge in patently circular reasoning. Thus, the Abe brief argues that one of the reasons supporting a "registered voters" measure in Hawaii is the fact that it tends substantially to exclude the military population. (Abe Br. 101-02) The brief then proceeds to argue that this exclusion of military personnel does not amount to invidious discrimination against them (as condemned by *Davis* v. *Mann, supra*) because the state has adopted a uniform policy of following a "registered voters" measure. (Abe Br. 104-05) We submit that it is not permissible to justify the practical exclusion of military personnel from the apportionment base on the theory that "registered voters" is a permissible measure while at the same time justifying the use of the "registered voters" measure on the basis that it excludes the military.

2. Perhaps sensitive to this essentially circular nature of any argument in support of the "registered voters"

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[9] As we will touch on later, the provision for periodic reapportionment on a "registered voters" measure—contained both in the existing Hawaii Constitution provision as to the House and in the Legislature's Senate reapportionment proposal—likewise indicates that the "registered voters" measure must stand or fall in itself. As we developed in our opening brief (pp. 67-70), the District Court affirmatively upheld the constitutionality of this provision. Since there is no way of predicting what relationship "registered voters" will bear in the future either to total population or to some adjusted total population measure, the only issue before the Court is whether the "registered voters" measure is *per se* permissible.

measure on the justification that it excludes certain specific segments of the population, several of the appellees in No. 318 at times logically and frankly espouse the proposition—which to us is the only one which could with consistency be urged in support of Hawaii's "registered voters" measure—that "registered voters" is of itself a permissible measure of apportionment. Indeed, certain of the appellees take the next logical step and contend that "registered voters" is the only permissible measure of apportionment, and that total population is not, in itself, a permissible measure.

Thus, the Richardson brief states the issue most clearly: "We submit that just the opposite [from the Governor's contention] is true: That total population as a basis for apportionment is constitutionally permissible *only* when the use of total population results in an apportionment substantially equivalent to that which the use of registered voters would produce." (Ric. Br. 10) And, while not as frankly put, this is the essential point of certain arguments of the Abe brief. (Abe Br. 96-100)—Indeed, the Abe brief is ineluctably led to the point that a state might not constitutionally pattern its apportionment measure after that of the Federal House of Representatives, which is of course expressly based on census population. (Abe Br. 99-100) Census population, the Abe brief contends, is a permissible measure only in view of the express provisions to that effect in the Federal Constitution.

The whole underpinning of this argument--which would apparently call in question the apportionment systems of a majority of the states, unless the results obtained through them happened to coincide with that which would prevail under a "registered voters" measure—appears to be, in

essence, certain statements by this Court in its previous reapportionment cases. (See Abe Br. 96-98) Thus, for example, it is urged that the statements in *Wesberry* v. *Sanders,* 376 U.S. 1, 17 (1964)—itself a congressional districting case—to the effect that the essential basis on which reapportionment suits may be maintained in the federal courts is protection of the right to vote, indicate that the "registered voters" measure is the only permissible substantive standard. (Abe Br. 97-98; Ric. Br. 8-9)

Clearly, this is not the case. Certainly the number of voters was not the appropriate substantive standard in *Wesberry* itself, since the Federal Constitution expressly says that the measure of apportionment in the House of Representatives is to be population. Indeed, *Wesberry* is a proof of our position; for there this Court clearly said that unless congressional districts were apportioned on a population basis (376 U.S., at 9-14) there would be a dilution in the voting rights of the qualified voters of the various districts. *Id.,* at 7-8. The Court specifically said that: "We do not believe that the Framers of the Constitution intended to permit . . . vote-diluting discrimination to be accomplished through the device of districts containing widely varied numbers of inhabitants." *Id.,* at 8. Thus, the standard as to whether a qualified voter's vote is diluted is whether it is cast in a district against which there has been discrimination with respect to "numbers of inhabitants."

Similarly, as we have developed in our opening brief, the basic substantive test in a state legislative reapportionment case is that of equality of representation. To say that the basis of standing in a reapportionment case is protection of the right to vote from dilution only poses

the question what is the proper measure of apportionment. As we have developed in our opening brief, the proper measure of the right to vote for state legislators as well as for representatives in Congress is the right to vote in districts which are substantially equal in population; it is when that right is impaired—through a system of unequal representation of the people—that the right to vote is impaired. The substantive measure is the Fourteenth Amendment's Equal Protection Clause, which protects "any person within its [a State's] jurisdiction." "Registered voters" is no more the appropriate substantive measure here than it was in *Wesberry*.

3. It is no answer to urge, as do several of the appellees, that the loss of the right to vote for failure to meet reasonable conditions upon registration—such as literacy tests, residence or age requirements, or requirements for the taking of some affirmative action—is not prohibited by the Constitution. The issue is not whether it is proper to deny certain persons—such as illiterates, those having their domicile elsewhere, minors, and those who do not bother to register—the right to cast ballots. The question is whether it is proper, because of these factors, to exclude the district in which these persons reside from a representation in the State's Legislature based on its population. As we have developed extensively in our opening brief, these are entirely separate questions. Not only the person who neglects to register, but his neighbor who does register, is disadvantaged when representation is based on a "registered voters" measure. All people—children and adults, literate and illiterate, registered and unregistered—are consumers of governmental services and are members of the body politic. Basing representation on a "regis-

tered voters" measure destroys the fairness of a representation system and thus dilutes the voting rights, under this Court's reapportionment decisions, of those persons in the underrepresented districts who have the necessary standing, as voters, to bring a suit for redress.

4. To sum up: The demands of logic—and the express provisions of the Hawaii Constitution, which the District Court affirmatively upheld, and which appellees defend here, calling for continuing reapportionment on the express basis of "registered voters" [10]—have forced most of the appellees to defend, as they must, the Hawaii "registered voters" measure in its own terms, rather than as a substantial equivalent of a population-based measure. Indeed, the logic of their position requires—as a number of them argue—that the "registered voters" measure be considered the *only* acceptable measure under this Court's decisions, in any state, at any time. As such, the position of the appellees is patently unsound. It would make a measure of apportionment which is followed in only a small minority of the states the only constitutionally permissible approach.

It is thus beside the point to seek to uphold the "registered voters" measure on the basis that it substantially excludes the military. In the first place, exclusion of the military is not in itself permissible.[11] Even if it were, it

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[10] See note 9, *supra*.

[11] As we developed in our opening brief (p. 65 n. 29) many of the military personnel in Hawaii own their own homes and have lived in the state for over five years. Thus, it would not be permissible *per se* to eliminate the military on the ground that they were transients, even apart from the teachings of *Davis* v. *Mann*. Moreover, as we have demonstrated, even where there are shorter

does not happen to be the approach that Hawaii has adopted; it has adopted a "registered voters" measure. Neither in form nor in substance is this the same as a "civilian population" measure.

As we have urged in our opening brief, the starting point in any proper apportionment system must be total population. It may be possible to justify, under the Constitution, modifications of that standard designed to exclude aliens, transients or other similar groups.[12] Also, as a practical matter, where a system which is based on an impermissible standard produces the same result as a population-based system would produce, the results of the system—though not the system *per se*—may be upheld. But

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tours of duty of the military, there is still permanently present, as a factor substantially and directly affecting the economic, social and governmental life of Hawaii a permanent military establishment in the State, composed of a relatively stable number of people, though the individuals who compose that number may change more rapidly than those who comprise the population of a state where there are no military installations. Given the presence of this element of population in a state, it is required, we submit, that in distributing representation within the state the state do so on a basis which reflects this element.

[12] As we stated in our opening brief (p. 67), we do not mean to say that the State is without power to cope with extraordinary wartime or emergency situations, such as that dwelt on by the appellees, the situation in 1944 when Hawaii was a staging area for World War II. But once again, we reiterate, the starting premise must be population—not some other measure which is totally different and which starts from a base containing less than one-third of the total population.

The point that it is allegedly possible to construct a single-member district on a total population measure without any registered voters in it, by taking in certain military reservation areas exclusively (Abe Br. 103), is a diverting one, but the answer is that the problems raised by such a district may be dealt with if it is ever formed. It is, of course, quite feasible to construct equal-population single-member districts without creating any such situation.

Hawaii's "registered voters" system is wrong on each of these standards. It does not purport to be a population-based standard or an acceptable modification of one. It is based on a fundamentally different approach. Since the system of "registered voters" apportionment is expressly imbedded in the State Constitution, the system itself may not be upheld. Since the present results of that system do not coincide with a population-oriented approach, the present results of that system may not be upheld.—Thus, the District Court erred in upholding the "registered voters" measure of apportionment in the House of Representatives.[13]

C. The District Court Erred in Sanctioning the Arbitrary System of Random Single-Member and Multimember Districting in Use in the Hawaii House of Representatives.

On this point too, an immediate clarification of the issues will be valuable. Our position is not that a system of multimember districting is *per se* unconstitutional; nor could this be our position in the light of the decision of this Court in *Fortson* v. *Dorsey,* 379 U.S. 433 (1965). The appellees in No. 318 at great length develop the proposition that there are virtues in a multimember districting system just as there are virtues in a single-member district system, and that the Legislature may constitutionally choose one or the other. (Abe Br. 32-46; Cr. Br. 25-32; Pl. Br. 17-19) The point, however, is that in the system employed in the Hawaii House of Representatives—and in the plan for the Senate rejected by the District Court—multimember dis-

[13] Likewise, its action in rejecting the Senate reapportionment plan is justifiable on the alternative ground that that plan employed a "registered voters" measure.

tricts, involving varying numbers of members per district, and single-member districts, are combined in a completely arbitrary and random fashion. The arguments, based primarily on the writings of political scientists, made by the appellees in support of a multimember district system[14] essentially support a system in which each of the districts has the same number of representatives. Appellees have not produced any argument in favor of a system in which the various districts have varying numbers of representatives, and we know of none. This discrimination, then, "reflects *no* policy, but simply arbitrary and capricious action." *Baker* v. *Carr*, 369 U.S. 186, 226 (1962).

The fact of the matter—as the appellees admit—is precisely that there are different political consequences attendant upon living in a single-member district or in a multimember district. One of them is that in a multimember district the individual is represented by a greater number of legislators and accordingly has a greater representational power than in a single-member district. If all the districts were represented by the same number of representatives, there would be no disparity in this regard. But in Hawaii this is not the case because the number of Representatives per district varies from one (in five out of eighteen cases) to six (in one case). It appears, then, that there are substantially different consequences of living in a multimember district and of living in a single-member district. What, then, is the basis on which it is determined whether a person will be represented by a single Representative or by a number of Representatives?—The answer is no more than the place of his residence. This is precisely

[14] See, in particular, Abe Br. 37-38; Pl. Br. 17-19.

the factor which this Court's decisions teach may not be employed as a factor. See, *e.g.*, *Reynolds* v. *Sims*, 377 U.S. 533, 565-68 (1964).

Our contentions are as follows: We contend that the Hawaii House districting scheme is unconstitutional because it is completely arbitrary[15] and results in differing representation of different persons solely because they reside in different areas of Hawaii. We also contend that, because the districting in the proposed Senate plan is based on the arbitrary districting of the House, it is also arbitrary and intensifies the discriminations inherent in the House scheme.

We disagree with the Abe Brief's contentions that the validity of a varying-member districting system does not depend upon the arbitrariness of the district boundaries and that courts will protect only the right to mathematical equality of the weight of votes. (Abe Br. 47-48) Courts are not precluded from inquiring into aspects of equal representation other than adherence to the equal-proportions rule. Once it is shown that a state has arbitrarily and irrationally granted different types of representation to different persons according to their place of residence, a violation of the Equal Protection Clause is established.[16]

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[15] As we suggested in our opening brief (p. 72), a varying size districting arrangement might possibly be justified if the districts themselves were based on a uniform standard, such as the boundaries of existing political subdivisions. *Cf. Fortson* v. *Dorsey*, *supra*.

[16] Demonstrating how it has missed the entire point of the argument, the brief of one of the appellees (Abe Br. 115) analogizes the Hawaii situation to one of election at large throughout a state, which presumably presents no constitutional difficulties since it is sometimes used as a remedial measure in reapportionment suits. The point is that in an election at large—just as if a state were

1. ***The Arbitrariness of the Districting.***

We contend that there is no rational basis for the variations in size of the Hawaii House districts. The districts range in population from 5,030 persons to 95,118 persons, and the number of Representatives elected from each district ranges from one to six. (Opening Br., p. 10) Similarly, Senatorial Districts under the proposed Senate plan range in size from 12,266 registered voters in 1964 to 40,629 registered voters in 1964 and would be entitled to elect from one to four Senators. (Opening Br., p. 18)

No rational basis can be perceived from an examination of the distribution of the House districts throughout the state. Large multimember districts are contiguous to single-member districts. Four of the five districts in Hawaii County are single-member districts, while the fifth elects three Representatives. Of the two districts in Maui County, one is a single-member district, while the other elects four Representatives. The County of Kauai is a single district electing three Representatives. Of the ten Oahu districts, two elect two Representatives each, two elect three Representatives, five elect four Representatives, and one elects six Representatives.

The size and distribution of the districts cannot be justified by a determination to use a particular type of boundary line, since the lines used include a hodge-podge of the boundaries of basic areas and islands, mountain ranges,

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divided into districts of substantially equal population, each electing two members or four members or six members—each person elects the same number of legislators as does everyone else in the state. This is not the case with the system in the Hawaii House of Representatives; and the distinctions which it makes have not been supported on the basis of any rational system.

canals, valleys, and streets, the boundaries of land tracts, and historical, election, educational, judicial, and taxation boundaries. It is no answer to say, as appellees in No. 318 do, that the various lines which are drawn individually have some historical or geographical or physical significance. It would be hard to draw lines which did not have some such significance. The point is, on what basis are certain boundary lines used rather than others; and on what basis is the decision made to construct boundaries which will produce single-member districts in certain cases, two-member districts in others, three-member districts in others, four-member districts in still others, and in one case a six-member district?—The briefs of the appellees in No. 318 can be read indefinitely without disclosing any single uniform principle on which the boundaries of the districts were drawn—and hence the decision reached as to whether people living in a particular area would be represented by one, two, three, four or six legislators.

None of the rationales proposed for the House districting scheme justifies the use of districts of such varied sizes and their arbitrary distribution throughout the state:

(a) The Richardson Brief attempts to justify the districts by discussing the procedures of the 1950 Constitutional Convention which drafted the House districting. It describes the delegation of authority for districting to the convention representatives of each county and the varying thought processes leading to the different districting schemes in each county. This information, which was not before the District Court and for which no authority is cited, evidently is based on Mr. Richardson's memory. It is not a proper subject for judicial notice at this point in the proceedings. Mr. Richardson has not testified to the

truth of this information nor has he referred this Court to any source of the information.

In any event, the information does not justify the variations in size and the distribution of the districts. The Lieutenant Governor attempts to justify the differences among the counties by the statement that "Each island is different" (Ric. Br. 21) and by the implication that therefore the Convention left the job of districting them to representatives of the counties. However, the fact that each island is different is relevant only if it is shown that the difference has a rational relationship to the difference in districting. No such relationship is shown. In addition, the fact that representatives of each county determined its districting is irrelevant; political approval of a districting scheme, whether by a Constitutional Convention, by representatives of those discriminated against, or by a majority of those discriminated against themselves, does not validate an unconstitutional scheme. See *Lucas* v. *Forty-Fourth General Assembly*, 377 U.S. 713, 736-37 (1964).[17]

And the mental processes of each group of representatives as described by Mr. Richardson do not in fact account

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[17] Indeed, to the extent it shows anything, the statements on this subject in the course of the Constitutional Convention prove the arbitrariness of the scheme. As Delegate Bryan put it:

> "We tried in districting to let the members from the various districts more or less decide what they wanted. For instance, on the island of Kauai, the representatives from the island of Kauai said they would rather have one district than to have three districts or four districts, so you notice that the island of Kauai is one district. The representatives from the fifth district said that they would like to have districts with approximately two or three, and as nearly uniform as we could make it. We have two for the three districts in rural fifth district and three for each of the three districts in urban fifth district." II *Proceedings of the Constitutional Convention of Hawaii*, p. 109.

for the differences in size and the random distribution of the various districts within each county. That Kauai was entitled to four of the fifty-one Representatives is not a reason for the use of a four-member district rather than four single-member districts. While it may have been rational for the representatives of Maui to create one single-member district embracing the islands of Molokai and Lanai, no reason appears for creating a five-member district on the island of Maui. That the island of Hawaii is large and has a varying economy is no reason to divide it into four single-member districts and one four-member district.

Appellee Richardson claims that the rural parts of Oahu were divided into Representative Districts on the basis of certain long-standing administrative districts. (Ric. Br. 23-24) To be sure, it does appear that the three rural Oahu districts, the Eighth, Ninth and Tenth Representative Districts, were formed from certain administrative districts which had been defined in Hawaii legislation.[18] But this is only further proof of the hodge-podge of districting created for the Hawaii House of Representatives. These administrative districts were not followed in setting up Representative Districts in the remainder of Oahu; and, although the same section of the statutes which provides for them also divides the other islands into administrative districts, these districts were not followed consistently in dividing the counties of Hawaii, Maui and Kauai into Representative

[18] The statutory provisions for these administrative districts—which presently are of importance only for purposes of defining the jurisdiction of the local district courts in the state (courts of limited jurisdiction, like a Justice of the Peace court)—are presently codified in Section 10-1, Revised Laws of Hawaii 1955, as amended.

Districts. Thus, the County of Hawaii, with nine administrative districts, was divided into five Representative Districts, four of them being single-member and the fifth a four-member district; the County of Maui, with seven administrative districts, was divided into two Representative Districts, one a single-member and the other a five-member district; the County of Kauai, which consisted of five administrative districts, became one Representative District with four members. The absence of any consistent policy is obvious.

The Richardson Brief (Ric. Br. 24-26) contends that as to the Representative Districts within the urban areas of Oahu County—the City of Honolulu—the Constitutional Convention adhered as nearly as possible to the ancient land districts known as ahupuaas. The boundaries of the Eleventh through the Seventeenth Representative Districts are sought to be justified in this manner. But there is no record whatsoever of what the boundaries of the ahupuaas within the urban areas of Honolulu are. It is incorrect therefore to state or imply that the Honolulu Representative Districts followed ahupuaa boundaries. Furthermore, there is no evidence, and Mr. Richardson fails to point out any, in support of his assertion that the members of the convention intended to draw the lines of those districts based on the concept of an ideal ahupuaa, running from the mountains to the sea. In any event, whatever rationality such districting may have had in feudal and agrarian Hawaii in providing the chief of an ahupuaa and his followers with seafood, lowland vegetation and mountain timber, it bears no rational relation either to modern urban conditions or to the end of legislative districting, the provision of equality of representation.

Contrary to a further suggestion of this appellee, most of the Representative Districts in Honolulu do not cover only a single area or neighborhood. For example, the Fourteenth, which he describes as Pauoa, includes one-half of Nuuanu, Punchbowl and Kakaako, as well as Pauoa; the Fifteenth, which he describes as Manoa, also includes Makiki, Moiliili, McCully, St. Louis Heights and Waikiki; the Sixteenth, which he describes as Kaimuki, also includes Palolo, Kapahulu and Diamond Head; the Seventeenth, which he describes as Wilhelmina Rise, also includes a portion of Kaimuki, Maunalani Heights, Waialae, Kahala, Aina Haina and several other districts. Each of the areas we have named is a quite distinct area of substantial size. Thus these Representative District boundaries cannot be explained as encompassing separate established areas.

(b) The Abe Brief attempts to justify the districting on the basis of the number of Representatives apportioned to Oahu. (Abe Br. 111-12) The relationship between a decision to apportion thirty-three Representatives to Oahu and a decision to create varied multimember districts is obscure. Certainly thirty-three single-member districts could easily have been drawn in this area of great population concentration, having almost five-sixths of Hawaii's 1960 population. (See Opening Br., p. 75)

This brief also suggests that the districting scheme reduces the possibilities of partisan gerrymandering. (Abe Br. 114) But whether or not fixing district lines and the number of Representatives prevents future gerrymandering, the fear of gerrymandering has no relationship to the extreme variations in size of the districts. The districts

varied in size when they were established. Their differences cannot be justified by population shifts since that time. This "justification" is a patent afterthought.

(c) Both the Abe Brief and the Cravalho Brief refer to general policies which are furthered by multimember as opposed to single-member districts. (Abe Br. 112, 35-46; Cr. Br. 31-35) However, these policies are irrelevant to the present issue. The issue is not the rationality of multimember districting in general. It is the rationality of the random use of districts greatly varying in size. The policy of reflecting state-wide rather than local views in the Legislature, for instance, does not support districting in which five districts, being single-member, reflect local views (under the appellees' assumptions) while the other thirteen reflect gradually broader views depending upon whether they are of a size entitling them to two Representatives or to six. (See Abe Br. 38-40.) Similarly, a policy in favor of establishing a strong two-party political system through large districts cannot justify a system containing districts of greatly varying size. (Abe Br. 40) Other rationales of the appellees which are fallacious for this reason include the "law of large numbers," the benefits to be gained through use of heterogeneous districts, and the insulation of legislators from pressure groups. They simply do not explain the completely arbitrary distribution of the single-member districts and the varying multimember districts.

(d) Perhaps the most revealing attempt to justify the multimember districts is the argument in the Cravalho Brief, relating to the large multimember districts on Oahu proposed by the Senate plan. (Cr. Br. 32) There it is argued that because the Senate must now be apportioned

according to population and thus the rural areas of Hawaii will lose their overrepresentation, the new urban Senators should be elected from larger districts than rural Senators in order to ensure their state-wide viewpoint. Thus, while rural interests are considered valuable local interests which should be preserved, urban interest groups are to be submerged in large districts, doubtless to ensure that urban Senators recognize rural problems. Such an attempt to justify the districting scheme, flying as it does in the face of this Court's decisions on the irrelevance of geography in representation, illustrates the impossibility of rationalizing the two districting schemes.

Thus, no rational basis for Hawaii's "crazy-quilt" districting has been suggested. This fact is the best indication that the burden of proving arbitrariness was fully carried before the District Court.

2. *Overrepresentation of the Large Multimember Districts.*

That the method of equal proportions has been complied with in the districting[19] does not minimize the discrimination against those residing in single-member or small multimember districts. Those who live in large multimember districts are represented in the Legislature by a larger number of legislators and do therefore have a greater opportunity to influence legislative decision-making. As we have demonstrated, there is no rational basis for these distinctions.

To disprove the discriminatory effect of these distinctions, the appellees in No. 318 argue that numerous repre-

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[19] As repeatedly pointed out by appellees, see, *e.g.*, Abe Br. 55, 58-59, 113.

sentatives may not represent an individual any better than one representative. (See, *e.g.*, Abe Br. 56) But this is clearly beside the point. For instance, in considering an apportionment scheme in which the equal-population principle is ignored, a court could not hold that the apportionment was constitutional because in fact a legislator from an underrepresented area happened to be a more efficient or powerful individual in the legislature than his colleague from an overrepresented area.

It is also argued that legislators from multimember districts are not necessarily more responsive to their constituencies than legislators from single-member districts. (See, *e.g.*, Abe Br. 54-57) While this may be true, unless each legislator from a six-member district was only one-sixth as responsive to each constituent as a legislator from a single-member district there would not be equality of representation. Certainly it cannot be assumed that multimember district representatives are this unresponsive to their constituents. The net effect is that constituents in multimember districts do have proportionately more representation than constituents in single-member districts.

3. *Submergence of Minorities Within the Large Multimember Districts.*

On this issue also, the appellees in No. 318 make the mistake of assuming that proof of actual underrepresentation of a specific individual is necessary to establish a violation of the Equal Protection Clause. They argue that proof that districting is arbitrary and that districts vary greatly in size plus proof that large multimember districts are highly heterogeneous is insufficient to prove submergence of minority groups. But we are not asking, as the Abe Brief suggests (Abe Br. 64-74), that each minority group in

Hawaii be identified and represented in the Hawaii Legislature. Rather, we are asking that persons be treated equally no matter where they live in the State.[20] If all districts in the state were equal in size, minority groups would risk submergence equally. However, if one district is six times larger than another, it is obvious that groups of persons in the large district who would be represented if the district were divided into six districts might not be represented.

The arguments of the legislator appellees in No. 318 concede that the larger the district the less likely that minority interests will be represented. They argue that a policy decision that legislators should have broad, state-wide interests led to establishing large districts. This is tantamount to an admission that the effect of creating large districts is to submerge local interests and minority groups. If this policy had been followed uniformly throughout the state resulting in creation of districts of uniform size, discrimination against specific minority groups might have to be shown, to demonstrate the invalidity of the system.

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[20] Accordingly, the repeated insistence in the Cravalho brief on the proposition that a state may not constitutionally set up racial enclaves for voting purposes misses the point. (Cr. Br. 38-42) Our argument, as we indicated in our opening brief (p. 80 n. 11), is not that the districting in Hawaii should give a particular voice to any particular race. Our point is that there are minority groups in Hawaii, racial and otherwise; that minorities—whoever they may be on a particular issue—tend to be submerged in the large multimember districts; and that no rational basis has been shown as to why certain areas of the State should be parts of large multimember districts and others parts of single-member or smaller multimember districts. It is this arbitrariness—which happens to have the consequences specified upon minorities in the large multimember districts—of which we complain.

However, since some districts are small and some are large, it is obvious that the policy was applied arbitrarily and that members of minorities are treated differently according to their place of residence. Once again, place of residence is not a valid basis for discrimination. See, *e.g.*, *Reynolds* v. *Sims*, 377 U.S. 533, 565-68 (1964).

Therefore, the argument that minorities may constitutionally be submerged by a determination to establish districts of 10,000 persons each rather than districts of 1,000 persons each is irrelevant. In those situations persons throughout the state are treated equally and a policy decision concerning the type of representative government to be established has been made and uniformly applied. The very point of our argument is that this is not the case as to the Hawaii House of Representatives.

II. THE DISTRICT COURT'S APRIL ORDER CORRECTLY DECLINED TO APPROVE THE LEGISLATURE'S PROPOSED REAPPORTIONMENT PLAN FOR THE SENATE

Many of the arguments of appellants in Nos. 323 and 409 have been answered in previous sections of this Reply Brief or are adequately dealt with in our Opening Brief. All of our discussion of the unconstitutionality of the House random multimember districting system is relevant here, and we shall now briefly address ourselves to certain specifics of the Senate random multimember districting system.

The appellants argue that the District Court erroneously placed the burden of justifying the proposed Senate plan on the legislators who developed it. Instead, they assert, the District Court should have presumed that the plan was

valid until any possible justification for it had been disproved.[21] (Abe Br. 20-26; Cr. Br. 27)

The context in which the District Court considered the plan is highly relevant to this issue. The District Court and all the parties, including the legislator-appellants, agreed that the Hawaii Senate apportionment violated the Equal Protection Clause. Originally, the District Court forbade the Legislature to enact a reapportionment statute or to propose a constitutional amendment respecting the Senate apportionment because of doubts as to the Legislature's power to reapportion itself by statute and because of what the court deemed the slowness with which the Legislature had acted in its consideration of reapportionment. (R. 78, 80; 238 F. Supp., at 478-79) However, on assurances by the Legislature that it was about to agree upon reapportionment, the District Court held that the Legislature might enact a provisional plan subject to District Court approval and might initiate a constitutional amendment concerning reapportionment. (R. 88-91)

Later, the District Court learned that the Legislature was considering a plan in which Oahu was to be divided into two districts, one electing nine Senators and the other electing ten Senators. The court, in an informal memorandum sent to the Legislature, indicated that it believed that single-member districts were preferable to multimember districts in the Senate, and that it would approve two-member districts "if and only if the legislature can affirmatively show

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[21] It is urged that the District Court was inconsistent in requiring plaintiffs to bear the burden of proof as to the House's invalidity, but requiring the Legislature to support the Senate provisional plan. (Abe Br. 25)

substantial reasons therefor." (Opening Br., App. B, p. 28a.) Despite this admonition, the Legislature adopted a plan consisting of one single-member district, one two-member district, two three-member districts, and four four-member districts.

The plan was approved by the Senate which all parties had agreed was unconstitutionally apportioned. Although the plan was approved by a majority vote in each house of the Legislature, its effectiveness was expressly made dependent upon approval by the District Court. (R. 117)

In this context, the legislators who considered the plan were in large part parties to the present lawsuit, devising a plan, with the permission of the court, to remedy the unconstitutional apportionment scheme under which they had been elected. It was expressly provided that the provisional plan would not become effective until the District Court approved it. The plan was not adopted in the manner provided in the Hawaii Constitution for the adoption of constitutional amendments. The plan thus devised was not entitled to the traditional deference given to state legislation enacted in the ordinary fashion which becomes effective upon passage by the legislature.[22] The District Court had the power in this situation to require the legislators to justify the constitutionality of their plan just as it would have the power to require any party to justify the constitutionality of a remedial decree the party proposed to the court.

The court also had the power, as pointed out in our opening brief, to require the legislators to justify the wisdom

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[22] Contrast *Fortson* v. *Dorsey*, *supra*, where the attack was on a provision already subsisting and in effect.

and effectiveness of the plan as a remedy for previous malapportionment.[23] The plan's use of multimember districts was highly defective in insuring dissipation of the effects of previous malapportionment, and even if these defects had not made the plan unconstitutional, as we argue they had, the District Court could have disapproved the plan in its discretion. For instance, the Cravalho Brief argues that the plan's random multimember districting scheme was justified because it would force Oahu Senators to hold statewide interests. (Cr. Br. 32) The Brief suggests that, because rural areas would lose their majority in the Senate under a constitutional apportionment, it was permissible to create urban districts with much greater populations than rural districts so that urban Senators would have a broad viewpoint. This is an admission that areas with previous underrepresentation were not to be allowed full expression of their individual views under the proposed plan. Certainly such a plan would not tend to dissipate the effects of earlier malapportionment.

Moreover, there was sufficient proof for the District Court to find that the proposed Senate plan violated the Equal Protection Clause even if all possible justifications for the plan are to be presumed. As pointed out in our discussion of the House districting scheme, that scheme was arbitrary and irrational. The proposed Senate plan also arbitrarily and at random created districts of greatly varying size, for which no adequate justification has been

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[23] Certainly the legislators had ample notice of the burden on them. The court had warned that any deviation from single-member districting would have to be justified. That Senators who depended on an unconstitutional apportionment for retention of their seats had helped to devise the plan was another reason for the court to require a justification of the plan.

suggested by the appellants in Nos. 323 and 409. The District Court, on the basis of uncontroverted evidence, found the existence of this variation in size. The District Court found, on the basis of substantial evidence, that the proposed Senate districts were based on present Representative District lines and that two of the eight proposed Senate Districts were coterminous or virtually coterminous wtih Representative Districts. The Senate districting is thus at least as arbitrary as the House districting. The attempts of appellants in Nos. 323 and 409 to justify the Senate Districts because of their relationship with the House Districts have the effect only of supporting the District Court's findings.

The appellants' other suggested rationales for the plan fail to explain the variation in size of the districts and the resulting different treatment of persons according to where they reside. The only exception to this is the argument in the Cravalho Brief that local rural interests, but not local urban interests, should be represented in the Legislature. (Cr. Br. 32)

The arbitrariness of the plan is underscored by the obvious discriminations the districting would cause. The District Court found, on the basis of uncontroverted evidence, that some of the large multimember House Districts contained highly heterogeneous populations. When joined with other House Districts to form Senate Districts, the populations become even more heterogeneous. The District Court also rightly focused its attention on the large multimember districts in the proposed Senate plan which had the same, or substantially similar, boundaries to those of existing Representative Districts. It demonstrated that the proposed Sixth Senatorial District, which had virtually the same

boundaries as the existing Fifteenth Representative District, the largest Representative District in the State, was an irrational conglomeration, including a number of completely disparate areas in terms of population classifications. (R. 157, 270-72, 329)

Thus, the minorities in House Districts which would be coterminous with Senate Districts would obviously never have an opportunity for representation, while the majorities would dominate a large percentage of the Legislature. The District Court properly found that minorities in the large multimember districts would be submerged and that majorities would be overrepresented. (See subpart C, part I, *supra.*) In the light of the arbitrary and random character of the construction of the districts, this violated the Equal Protection Clause.

True, equality of population[24] among districts is fundamental. Yet, as correctly pointed out by the court below, districting proportioned to population may still deny fair, effective and equal representation to the people, absent a totality of consideration of such other important factors as "community of interests, community of problems, socio-economic status, political and racial factors" in creating districts and absent a consideration of the interrelation of all districts one to the other, and the interrelation of representation in one house to that in the other, to achieve "substantial equality of meaningful representation to each and all of the voters of the State." This is particularly true in the State of Hawaii and in the City and County of Honolulu which contains about 80 per cent of the population (R. 339),

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[24] Once again, we note that the Senate plan did not provide even this, based as it was on the "registered voters" measure.

where the habitable area is small but includes a highly divergent populace. As the court below correctly concluded, there was no totality of consideration of these factors, and the Legislature, whether innocently or designedly, failed to provide equity in representation.[25] (R. 161; 240 F. Supp., at 730)

CONCLUSION

For the reasons stated in our opening brief and this Reply Brief, paragraphs 1, 2, 3 and 4 of the decision and order of the District Court dated February 17, 1965, should be reversed, except insofar as they invalidated the provisions of Article III, Section 2, of the Hawaii State Constitution fixing the number of Senators per Senatorial District and the provisions of Article XV, Section 2, of that Constitution pertaining to constitutional amendments affecting representation in the Senate; and the decision and order of the District Court dated April 28, 1965, insofar as

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[25] A few words about what the District Court did *not* do by its April 28, 1965, decision are necessary because of certain imputations advanced by appellants in No. 323 and No. 409. The Cravalho Brief asserts that the court was requiring segregation of races into separate legislative districts. (Cr. Br. 38-42) The Abe Brief asserts that the court below was mandating that all districts be homogeneous in composition. (Abe Br. 63-74)

Of course, the court did no such thing. As our discussion makes clear, the court's censure was directed toward the Legislature's utter failure, in creating the kind of random multimember districting that it did, to consider the totality of all of the factors—community of interests and of problems, socio-economic, political and ethnic factors, as well as the basic factor of population equality—especially in view of the obviously highly conglomerate composition of the populace; and toward the Legislature's failure to consider the interrelation of the districts to each other and the interrelation of representation in the House to that in the Senate.

it rejected the Legislature's proposed Senate plan, should be affirmed.

Respectfully submitted,

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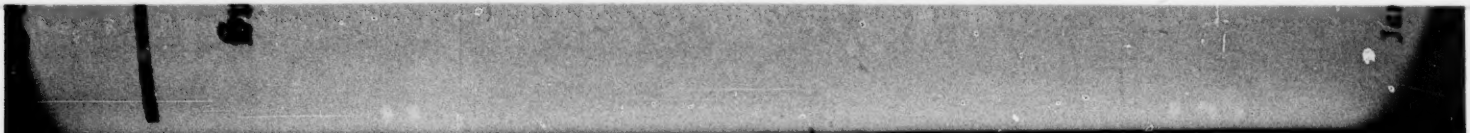

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

Nos. 318, 323 and 409

JOHN A. BURNS, Governor of the State of Hawaii, *Appella*

—v.—

WILLIAM S. RICHARDSON, *et al.*, *Appelle*

ELMER F. CRAVALHO, *et al.*, *Appellan*

—v.—

WILLIAM S. RICHARDSON, *et al.*, *Appelle*

KAZUMISA ABE, *et al.*, *Appellan*

—v.—

WILLIAM S. RICHARDSON, *et al.*, *Appell*

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

BRIEF FOR HAROLD S. ROBERTS
Amicus Curiae

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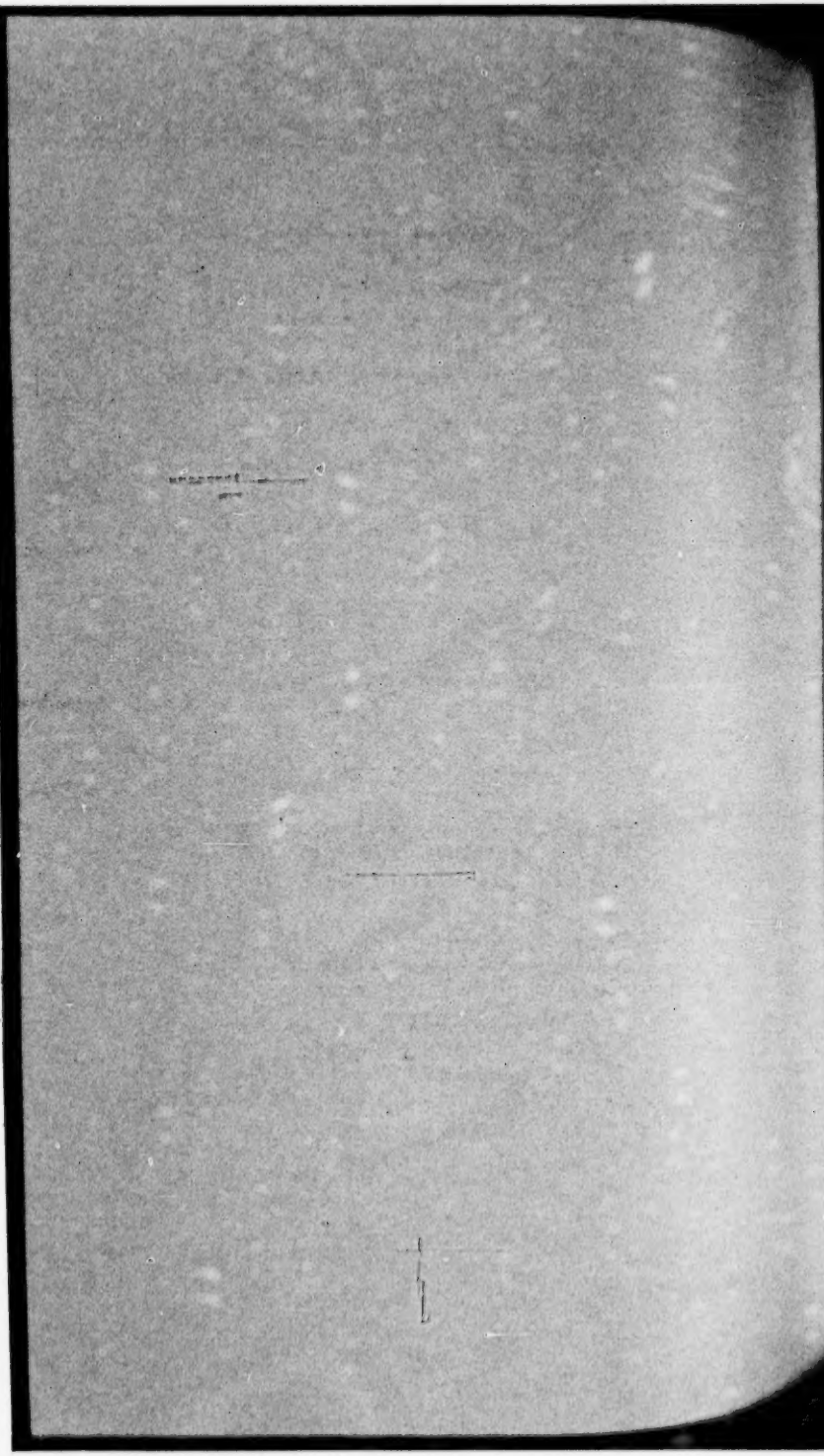

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I - TIMELINESS

THE APPEALS WERE NOT TAKEN IN TIME

The principal Order of the District Court was filed in the Clerk's office on February 17, 1965. All of the parties had actual knowledge of the Order, and in fact a Motion to Alter was filed promptly. The March 9 and 19, 1965 Orders, in response to the Motions; did not stay any paragraph of the February 17 Order relating to the validity of the Hawaii Constitution apportionment provisions or relating to how to reapportion. That the February 17 Order was not "*entered*" technically until April 9, 1965 was the result of an oversight by the Clerk's office, but had no effect on the actual knowledge of the parties concerning the February 17 Order. The April 28, 1965 Order did not even mention the unstayed provisions of the February 17 Order.

The net result is that the appellants are trying to raise on appeal questions which were decided on February 17 and not changed thereafter, and the only way appellants seek to justify their failure to file notice of appeal within sixty (60) days after February 17, is on the technicality that the February 17 Order was not "*entered*", although all concerned not only had actual knowledge but acted upon it.

It is also apparent and supports our contention that all issues except the advisory temporary Senate reapportionment had been disposed of under the February 17 order and not appealed, that had the District Court accepted the Legislatures apportionment of the Senate, there would be no cases Nos. 318, 323 and 409 before this Court. Appellants are seeking to reopen all of the issues which had been previously decided.

II - STANDING OF THE GOVERNOR AS APPELLANT

THE GOVERNOR OF HAWAII HAS NO STANDING

Whether the Governor had standing to intervene as a plaintiff, and, if so, in what capacity, are questions which were not raised or decided by the District Court. (This is also true as to the intervening Senators and Representatives, and the objections to the Governor's standing appear to be equally applicable to their standing.) The Governor moved to intervene as a citizen, taxpayer, elector and voter, and also as Governor. No one objected. This is understandable. The Lt. Governor, being the operator of the election machinery in Hawaii, was defendant. He was not represented by the Attorney General. Instead, the Attorney General represented the Governor, so that the Lt. Governor was required to look elsewhere for counsel.

Thus, it is on this appeal that, for the first time the Governor's standing is being questioned.

As Amicus sees the situation, there are two possible capacities for the Governor -- (1) representative, as Governor; and (2) as an individual -- and the Governor does not have standing in either capacity.

As Governor, he represents the State of Hawaii--all of the people. Under the Hawaii Constitution (Article IV, Section 5) *"The governor shall be responsible for the faithful execution of the laws."* He is sworn to uphold the Constitution of the United States and the Hawaii State Constitution. Moreover, the State of Hawaii is in effect the defendant, as the Lt. Governor, upholding the Hawaii Constitution and statutes, represents all of the people. If the State, via the Governor, intervenes as plaintiff, the State is then on both sides of the litigation. Concerning his standing to intervene as Governor, the Governor himself is doubtful. The sole reference to standing in the Governor's Brief is found in footnote 8 on page 13. Therein, he does not state unequivocally that he has standing as Governor, but instead states his view in the following language *"whether or not he has standing in his capacity as Governor and as a representative of the people of Hawaii,..."* and does not cite any authority therefor.

In the above-mentioned footnote, the Governor does take the position that he has standing as a *"citizen, taxpayer and elector of the State of Hawaii and a qualified voter in Hawaii's Fifth Senatorial District and Eighth Representative District (R. 38)."* But how can the Governor have an individual capacity in reapportionment litigation? It is impossible for him to divest himself of his representative capacity as Governor. Usually the Governor is a defendant in such litigation. In footnote 8, on page 13, the Governor cites Baker vs. Carr,

369 U.S. 186, 204 n. 23 (1962), but that reference has no bearing on the Governor in his individual capacity as an intervening plaintiff in litigation where his Lt. Governor is defendant. Amicus has not found a single case where a state governor so intervened.

III - JURISDICTION

THIS COURT SHOULD REFUSE TO ACCEPT JURISDICTION

This Court has noted probable jurisdiction. However, no question raised is either federal or substantial, and in addition all questions raised are simply requests for advisory opinions.

In order to understand the foregoing conclusions, awareness of the history of reapportionment litigation in Hawaii in 1964 is necessary. The primary goal of plaintiffs in such litigation was the reapportionment of both chambers of the legislature, hopefully by the legislature itself, prior to the 1964 general election on the first Tuesday in November.

The decisions in Reynolds vs. Sims and the other reapportionment cases were announced by this Court in June 1964. In early July, the Attorney General of Hawaii issued a number of opinions on the effect of such decisions on the

Hawaii apportionment situation. These opinions were a complete package, covering the who, why and when of reapportionment. Soon thereafter, a friendly suit was instituted in the Supreme Court of Hawaii against the Lt. Governor, who is responsible for the election machinery, in the form of a submission on an agreed statement of facts. The Attorney General asked to appear as Amicus Curiae and on oral argument was asked why he was not representing the Lt. Governor. "*The plaintiffs in that suit sought to enjoin the conduct of any future election of members of the Legislature under existing apportionment law on substantially the same grounds alleged by the plaintiffs in this proceeding.*" Governor's Brief, page 89. When the Hawaii Supreme Court refused to grant such relief," . . . the case was dismissed by stipulation of the parties." (Governor's Brief, page 89, n. 4.) No appeal was taken from the decision of the State Supreme Court. Then the same law firm, with different plaintiffs, went across the street to the Federal Court and filed suit there, seeking the same relief. In this new action, the Attorney General represented the Governor, who moved to intervene as a plaintiff. The Lt. Governor was again the defendant and represented by private counsel. The District Court, like the Supreme Court of Hawaii, refused to enjoin the 1964 elections.

When the above-mentioned primary objective of the 1964 reapportionment litigation in Hawaii was not achieved, and especially after the District Court's

February 17, 1965 Order requiring conformance with Article XV of the Hawaii State Constitution, the strategy shifted and the legislators and the Governor, according to the District Court, requested that the legislature be given an opportunity to suggest a plan for temporary reapportionment of the Senate that the District Court might consider as its own and present such plan as a temporary plan for consideration by the people at the general election in 1966. The District Court, seeking to find an amicable solution, and *"by agreement of all the parties"* attempted to make such a solution possible.

The Hawaii Supreme Court considered the questions relating to the Hawaii Constitution to be matters *"of local law, not federal constitutional right."* Guntert vs. Richardson, 47 Haw., 662, 667; 394 P. 2d 444, 447 (1964). See Governor's Brief, page 89. It stated in the following language its reason for not acting: *"However, the legislature is now in special session. We must and do assume that the legislature will take suitable action. That possibility provides justification 'for a court of equity to stay its hand temporarily.'"* (47 Haw., at 668, 669; 394 P. 2d, at 448.) The Hawaii Supreme Court required the legislature to follow the amendment procedure of the Hawaii Constitution and either propose a constitutional convention or propose a constitutional amendment. The Legislature in the 1964 special session did neither at a cost of about $250,000.

There is no Federal question concerning the validity of the amendment provisions (Article XV) of the Hawaii State Constitution. Questions relating to how to reapportion--such as basis of apportionment (number of districts, single vs. multi-member districts) are merely requests for advisory opinions. Even if these questions were justiciable, they are not substantial. These issues, properly, are for a constitutional convention to consider in the light of all relevant factors, including the landmark decisions of this Court.

IV - ARGUMENTS IN SUPPORT OF THE FEBRUARY 17, 1965 ORDER OF THE DISTRICT COURT.

THE HAWAII LEGISLATURE LACKS POWER TO REAPPORTION ITSELF, EVEN TEMPORARILY.

On the "*merits*", the threshold issue is who shall reapportion. Only after it is passed, do the issues relating to how to reapportion, arise. To properly appraise and understand this question it is necessary to review briefly the history of legislative apportionment in Hawaii.

A - THE REQUIREMENTS OF THE HAWAII STATE CONSTITUTION:

1 - BACKGROUND OF REAPPORTIONMENT IN HAWAII (1900-1950)

The failure of Hawaii Territorial legislatures to reapportion under the Organic Act of 1900 led the delegates to the 1950 Convention, which wrote the present State Constitution, to devise a procedure which by-passes the legislature as the vehicle for reapportionment. It also set up mandamus provisions (Article III, Section 4) to require the Governor to carry out the ministerial functions in applying the equal proportions provisions of the Constitution. The people reserved to themselves the authority to revise or amend the Constitution; to re-draw the legislative districts and to provide the proper balance of power as among the three branches of Government. Efforts by the

Legislature or the Executive to change the structure and balance of the Hawaii State Government, without following the constitutional procedures set out in the constitution, must be strenuously opposed by the people of Hawaii. This is the major reason for the efforts of Amicus before this Court.

When the Constitutional Convention of 1950 wrote the revision and amendment procedures of the State Constitution, it was writing in awareness of the previous 40 years of failure of the Territorial legislature to reapportion under the existing Organic Act.

The Organic Act, the equivalent of our State Constitution while we were a Territory, provided that both houses of the legislature were to be reapportioned from time to time on the basis of citizen population.

Section 55 of the Organic Act dealing with the Legislative Power of the Territorial legislature provided in part: (31 St. at L. 141, c. 33 as amended. See Revised Laws of Hawaii, 1945, p. 32.):

> "The legislature, at its first regular session after the census enumeration shall be ascertained and from time to time thereafter shall reapportion the membership in the senate and house of representatives among the senatorial and representative districts on the basis of population in each of said districts who are citizens of the Territory;...." (Emphasis added.)

The record of Hawaii's legislature was typical of many mainland legislatures. They failed to carry out the provisions of statutory or constitutional requirements to reflect the changing population patterns which developed so rapidly during the 20th century -- a shift from the rural agricultural communities to the urban industrial centers of the several states.

Although the Organic Act provided for periodic reapportionment of both houses, reapportionment of the senate was not required by the 1950 Constitution. The apportionment of the Hawaii senate was more or less set on the basis of geography, giving the neighbor isles a majority of the senators in the legislature.

The apportionment procedure for the lower house followed the procedure of equal proportions used by the House of Representatives in the federal Congress. It is generally accepted as a reasonable statistical device for apportioning seats to reflect changes in population. Other procedures may be more equitable, but it is a procedure which this Court has held valid.

Procedures for Amending the Hawaii Constitution of 1950.

The procedures for revising and amending the Constitution are twofold. One permits amendments to be proposed by the legislature, which, if approved by a two-thirds vote in both houses during a session, or if by a majority in two

sessions, would be submitted to the people at a general election for their approval or disapproval. If the people approve the constitutional amendment, it then becomes effective. The second procedure is for the calling of a constitutional convention which has the authority to review the constitution and make recommendations for changes. These are subsequently submitted to the people for ratification, and if approved by them, they become effective. In both cases, prior approval by the people is required before the constitutional change becomes effective.

This is the clear meaning of Article XV of the Hawaii State Constitution. It is also clear in the committee report which presented the Revision and Amendment section of the Constitution. The report stated in part:

> *"Your committee was in general agreement that the method of adoption or ratification of an amendment or revision should be only by direct popular vote and has so provided in the proposal submitted."*

The Constitutional Convention adopted the committee's report and recommendations, and the people of Hawaii adopted the Constitution by a three to one vote. It would appear clear, therefore, that the legislature and the Executive are required by the clear and explicit language of the Constitution, the committee report and the intent of the convention delegates, as well as by their

oath of office, to support the Constitution of the State of Hawaii.

The following comments from the debate on the revision and amending section of the Constitution illustrate the position of the delegates with regard to keeping reapportionment in the hands of the people:

During the discussion of an amendment proposed by Delegate Mizuha that "*constitutional conventions may be called as provided by the law,*" the delegates made it clear they were not going to leave the question to the discretion of the legislature.

> "*ROBERTS: I believe it was the original intention of this article, that the proviso for a constitutional convention be self-executing ...the original purpose...(dealing with the establishment of a constitutional convention was designed) so that the thing is kept out of the hands of the legislature...The language ought to be mandatory. It should not be left to the legislature to authorize such State officer to act.*" (Proceedings of the Constitutional Convention, Morning Session, June 15, 1950, p. 74).
>
> "*MAU: If this motion is carried and that provision is placed in the Constitution, we may find ourselves in the same position as we have found ourselves in the last 40 or more years on the question of reapportion-*

ment. The legislature may do nothing about it, and I think it should be mandatory that the constitutional convention be called every so often...if we adopt that amendment, we won't have that opportunity if the legislature will conduct itself as it has in the past on the matter of reapportionment." (Proceedings, p. 748). (Emphasis added).

"TAVARES: ...It seems to me that's a reasonable provision (the provision submitted by the Committee) and if you just leave it up to the legislature as it has been said, there is a possibility that the legislature may not act for 20, 30 or 40 years." (Proceedings, p.748).

"ROBERTS: It seems to me that providing language which merely authorizes the legislature to call for such a convention completely misses the purpose of the original proposal. This proposal mandates, it requires that the people review periodically, in this section every ten years to examine the Constitution, to examine the interpretations, and find out whether or not the Constitution at that stage is still the kind of Constitution they want...The people ought to have the opportunity, apart from the proviso based on whether the legislature wants it or not, to vote on that question periodically." (Proceedings, p. 748).

> *"TAVARES: ...This provision is meant to be self-executing. We don't want any more situations where, as at present, for 50 years the legislature failed to do something that is supposed to be done."* (Proceedings, Afternoon Session, June 15, 1950, p. 749.)
>
> Delegate Mizuha's amendment was voted on and lost.

The Constitution is clear; the committee report of the Constitutional Convention as well as the discussion on the floor of the convention appears clear on the procedure for revision and amendment of the State Constitution. In addition, the question was submitted to the Hawaii State Supreme Court and it upheld the contention that the only proper way to amend the Hawaii State Constitution is under the procedures set out in that document. (Guntert v. Richardson, 47 Haw., 394 P2d. 444 (Haw. July 27, 1964.)

When the issue came before the District Court, the Court stated very emphatically:

> *"As pointed out by the Supreme Court of Hawaii...any change in the representation from any senatorial district must be by constitutional amendment. This Court concurs!"* (February 17, 1965 decision and order).

The question might be asked as to why it is so important that the provi-

sions of the State Constitution be followed when the legislature was willing to come up with a plan and did so at the 1965 regular session of the legislature (although held invalid by the District Court). In order to clarify this point, it is important to note two things: First, if a legislature can nullify or change a provision of the Constitution in a manner which is not provided within the constitution, or through some plenary authority which it might claim, this makes meaningless the specific terms and provisions of a constitution. Secondly, it is important to draw a clear distinction between the function and purpose of a constitution and the function of a statute.

Under the Constitution the people reserved certain rights to themselves and delegated only to the extent that they desired to delegate authority.

The importance of constitutional amendments and procedures for changing a constitution is set out in the restatement of constitutional law which was cited in the case before the Hawaii Supreme Court. 11 Am. Jur. Constitutional Law, Section 22, reads:

> *"It is settled that amendments to our (State) Constitutions are to be made only in modes pointed out or sanctioned by the instrument itself, the legal exponent of the will of the majority, which alone is entitled to the force of law.*

Under our institutions sovereignty resides in or with the people and may be exercised in the manner they have provided by the Constitution. The power to change a state Constitution is generally exercised in either one of two methods -- namely, by convention of delegates chosen by the people for the express purpose of revising the entire instrument or through the adoption by the people of propositions for specific amendments that have been previously submitted to it by the legislature. It can be neither revised nor amended, except in the manner prescribed by itself, and the power which it has conferred on the legislature in reference to proposing amendments, as well as to calling a convention, must be strictly pursued.

Any attempt to revise a Constitution or adopt a new one in any manner other than that provided in the existing instrument is almost invariably treated as extraconstitutional and revolutionary."

It is important, if we are to give meaning and substance to our Constitution that before any reapportionment is actually put into effect and elections held under a changed reapportionment provision, it must first be approved by the people through referendum vote. There is no real choice provided to the people if reapportionment has already been established and the legislature elected under the new reapportionment plan, and the people faced with an ex-post facto situation.

The Constitution of Hawaii does not extend authority to the legislature to reapportion on a permanent or temporary basis. Article III, dealing with the legislature, says in Section 1:

> *"The legislative power of the State shall be vested in the legislature, which shall consist of two houses, a Senate and a House of Representatives. Such power shall extend to all rightful subjects of legislation not inconsistent with this Constitution or the Constitution of the United States."*

Action by the legislature to reapportion itself would be inconsistent with the provisions of the State Constitution. The revision and amending procedures are specific and clear and are supported by the decisions both of the Supreme Court of the State of Hawaii and the Federal District Court.

For this Court to accept the position of appellants, that it is possible for the legislature to reapportion itself, and/or to give the Executive authority to re-district, which is in direct conflict with the clear language of the Hawaii State Constitution, the Report of the Revision and Amendment Committee of the Convention, and the statements of the Delegates on the floor of the Convention, is to undermine and ultimately destroy an integral and necessary part of the Hawaii State Constitution, (Article XV), which article is not in conflict with the Federal Constitution. This Court should not permit itself to become a party to destroy such an essential element of constitutional government.

2. THE LEGISLATURES ROLE IN REAPPORTIONMENT IN HAWAII

We now return to our contention that on the *"merits"*, the threshold issue is who shall reapportion. The question of *"who"* must be in the context of Hawaii's history and Constitution.

Appellant divides the who issue into temporary and permanent reapportionment, admitting that permanent reapportionment requires that the Hawaii Constitution be amended. During the 1964 special session, appellants argued that they had plenary power to apportion permanently.

As to temporary reapportionment, the Governor contends that the legislature has power. Amicus contends that the legislature does not have power. As authority, appellant relies on one case, saying *"The holding of the District Court flies in the face of Maryland Committee vs. Tawes, 377 U.S. 656 (1964)"* Governor's Brief, page 86.

However, the Maryland case does not govern the Hawaii situation, as the constitutions are fundamentally different as to: (1) reapportionment of the legislature (2) power of the legislature; and (3) relative power of the legislature and the people concerning amendment.

In Maryland, there is no constitutional provision concerning reapportionment of the legislature; in Hawaii, there are provisions dealing

with reapportionment of the legislature (the House of Representatives). Haw. Const., Art. III, Sec. 4.

In Maryland, there is no provision in the constitution concerning amendment, other than a provision for the ascertaining at a general election each twenty (20) years, *"the sense of the people in regards to calling a Convention for altering this Constitution."* Md. Const., Art. XIV, Sec. 2. But the only way in which the sense of the people can be translated into a constitutional convention is by action of the legislature. Thus, if the Maryland legislature chooses not to act, there is no method by which the constitution may be amended. In Hawaii, there is a provision in the constitution concerning amendment. (Haw. Const., Art. XV.)

In Maryland, the legislature is given plenary power. In Hawaii, *"All political power of the State is inherent in the people; and the responsibility for the exercise thereof rests with the people. All government is founded on this authority."* (Haw. Const., Art. I, Sec. 1).

To sum up, if the framers of the Hawaii Constitution had wanted the legislature to have power to reapportion itself, they would have said so. They did not say so.

Thus, in Maryland the only possibility was temporary reapportionment, and the only choice was between the legislature and the courts. In Tawes, this Court gave the Maryland legislature another chance, even though its past

performance did not justify it, for, although the people of Maryland in the 1950 general election had approved by an almost four to one majority the convening of a constitutional convention, the Maryland legislature repeatedly refused to enact the necessary enabling legislation. Nor did the Maryland legislature, after Tawes, justify the Supreme Court's confidence in it, having failed to complete action on reapportionment in the 1965 regular session which adjourned March 30. In Hawaii there is no temporary reapportionment choice between the legislature and the courts, for the legislature has no such power.

The Governor's Brief, page 88, also cites Roman vs. Sincock, 377 U.S. 695 (1964) for the proposition that reapportionment is basically a legislative function. This Court did so state in that case, because under the Delaware constitution the amendment power was in the legislature. However, as already indicated, Delaware is not the same as Hawaii in this respect so the Roman case is not authority for the Hawaii legislature to reapportion itself.

Pursuant to legislation enacted by the 1965 regular session of the legislature and allowed by the Governor to become law without his signature, there will be submitted to the electorate at the general election in November 1966 the question *"Shall there be a convention to propose a revision of or amendments to the Constitution?"*, in accordance with the provisions of Art. XV, Sec. 2, of the Hawaii Constitution.

Amicus supports the logic of this Court's position in the Maryland case - namely that the plan had to be examined in its entirety. As a matter of fact it is the opinion of Amicus that "*as a whole*" applied to the reapportionment article has even more meaning when applied to the Constitution. When the legislative article is ripped out (or amended), this has a serious effect on the balance of the Constitution -- the relation of the legislature to the co-ordinate branches of government. This is one of the reasons why it would be most appropriate to have a Constitutional Convention review the proposed changes.

It might also be called to the Court's attention that the 1950 Constitution was submitted to the people "*as a whole*", and it was ratified by a three to one vote. To adopt the kind of reapportionment urged by the Governor (25 single member Senatorial districts instead of 6 and 51 Representative Districts instead of 18, proposed by him as Administration measures) and giving him the authority to reapportion and re-district every ten (10) years, would substantially shift the balance of political power within the State. The 1950 Convention gave the Governor extraordinary executive power in our Constitution (we also have a very short ballot--only the Governor and Lt. Governor--besides the legislature are elected). The Governor also holds the balance of power with respect to the Judiciary (judges being appointed by the Governor --with the consent and advice of the Senate). To give him additional powers in the determination of the composition

of the legislature--as well as to hold the pork-barrel club to punish single district legislators who refuse to buckle to the *"unit rule"*, (not as easy to do in multi-member districts) would be unwise and improper. This Court should give careful thought before it seeks to extend the *"plenary authority"* doctrine of the legislature found in the Tawes case, or to urge *"single member districts"*.

The question of single versus multi-member districts and the authority (plenary or otherwise) of the legislature are proper questions for the next Constitutional Convention--or for proposals by the legislature to the people under the Revision and Amendment section (Article XV) of the Constitution, and *"prior approval"* by the people before they become effective.

The Governor's Brief argues that the two houses are inter-related because the political districts remain intact and that Senate districts are composed of from one to four representative districts, and that the *"Governor may reapportion the House, ...only by reallocating the number of representatives and not by redrawing district lines, except in one limited circumstance. The purpose of the constitutional draftsmen in creating a scheme in which the districting of one house was substantially dependent on that of the other was undoubtedly in large part to insure that the Senate Districts would be larger geographically and a number of constituents than the House Districts."* (Governor's Brief, page 36.)

This illustrates the conjectural inaccuracies of attorneys unfamiliar with the purpose of the "constitutional draftsmen". The prime purpose was to prevent the Governor or anyone else from "gerrymandering" by redrawing the District lines--except in the "one limited circumstance"--i.e., where the "registered voters in any one representative district be less than one half of the quotient obtained by dividing the total number of voters registered in the State by the total number of members to which the house is entitled,..." Haw. Const. Art. III, Sec. 4.

The statement in the Governor's Brief, page 37, that the District Court's Order upholding the House apportionment "*has grossly embarrassed orderly reapportionment in Hawaii.*" is preposterous. If anything is grossly embarrassing, it is the failure of the State Executive and legislative branches to comply with the provisions of the State Constitution, their refusal to abide by the decision of the Hawaii Supreme Court in August 1964 and the Federal District Court Order in February 1965.

The District Court Order should be upheld and the case remanded to the District Court to take the necessary steps to modify its time-table to require that the terms of the State Constitution be followed.

Should this Court require reapportionment in time for the 1966 election, Amicus would urge this Court to consider the following proposals in order not to "embarrass any attempt at reapportionment through constitutional amendment" as stated so succinctly on page 41, of the Governor's Brief:

(1) Have members of the legislature run under the existing apportionment plan but to have all senator's terms expire in 1968 and

(2) Remove all district barriers and have the legislature, house and senate, elected at large, and have the District Court take the necessary steps to seek compliance with the State Constitution and mandate the legislature to enact constitutional convention legislation so that a reapportionment plan approved by the people and conforming with this Courts decisions will take effect by 1968.

B - REGISTERED VOTER POPULATION VS. CENSUS TOTAL POPULATION

This issue as well as the question of single-member versus multiple-member districts are, in the opinion of Amicus, not federal or constitutional questions. They are part of the total political, economic and social fabric which needs to be considered during constitutional amendment or revision, in order best to meet the needs of the

people of the State. As long as the use of registered voter population or multiple-member districts does not result in denial of voting rights to individual citizens, or in gerrymandering, with its resultant; invidious discrimination, this Court should permit the broadest freedom and latitude for delegates to future Constitutional Conventions to fashion the structure and philosophy of State Government so as to best meet the needs of changing times.

1 FINDINGS OF THE DISTRICT COURT

Amicus supports the findings of the trial court (the District Court) set out in its February 17, 1965 decision. He calls the Court's attention to the following remarks of the Court:

"This court finds nothing in Article II which is constitutionally invidious as discriminating against any one on the basis of race, color, creed, employment or geographical location, and as indicated in Article III, Sections 2 and 3, defining who may elect senators and representatives, it appears that the term 'qualified voters' is used practically synonymously

with registered voters under Article III, Section 4."

"This court is not prepared at this time to accept plaintiff's premise that total population is the only basis upon which apportionment of state legislatures can constitutionally be based. The Court in WMCA v. Lomenzo, supra, notes that 'New York uses citizen population instead of total population, excluding aliens ..., for purposes of legislative apportionment' and apparently found nothing invidious in that fact."

***

"This court, at this time, can only determine if the basis of apportionment, when adopted in 1950 and when used for reapportionment in 1959, did in fact at those times result in apportionment 'substantially on a population basis.'"

***

"If total population were to be the only acceptable criteria (sic) upon which legislative representation could be based, in Hawaii, grossly absurd and disastrous results would flow..... For example, if Hawaii's reapportionment year had been 1944, when the civilian population was 464,250 and the military

> *population was 407,000, then areas which normally might have a total population entitling them to but a small percentage of the total number of legislators would suddenly find themselves controlling over 90% of the legislature--for the following 10 years!"*
>
> ***
>
> *"....if the State were reapportioned at the present time on a straight total population basis, the Fifth senatorial district, containing within its bounds most of the military and naval installations of the State, would be entitled to 13 senators--a majority of the Senate."*

This was in February 1965. In January 1966 the situation is reversed. The Vietnam war has resulted in major shifts in the military population of Hawaii. From 10,000 to 20,000 individuals of the 25th Division are in the process of being shipped to Vietnam. (Bank of Hawaii: Review of Business and Economic Conditions Jan. 1966, p.3) Their wives and families are being relocated on the mainland. If reapportionment was to be determined on the basis of total population in January 1966, the Fifth senatorial district would lose a number of its potential Senators. A measure as unstable as this is hardly an equitable tool to provide stability in reapportionment.

On the question of the franchise for the military, the District Court found:

> "...no scheme in Hawaii's Constitution or in the statutes implementing the exercise of franchise which is aimed at disenfranchising the military or any other group of citizens."
>
> ***

The District Court concludes that there was no indication of gerrymandering in the invidious sense:

> "This Court does not hold that registered voters as a basis for representation is the perfect basis. Paraphrasing the words of The Court in Fortson v. Dorsey, ... this court finds the use of registered voters as a basis of apportionment did not, in Hawaii, in fact 'designedly or otherwise...operate to minimize or cancel out the voting strength of (any)... elements of the voting population.' Nor did it in 1959 bring about that result."
>
> ***
>
> "As the records of the Constitutional Convention show (Proceedings, 103-111), the districting, both for the Senate and the House of Representatives, followed along historical, political,

geographic and physical lines. There was no gerrymandering in the invidious sense."

2 - WHY THE CONSTITUTIONAL CONVENTION ADOPTED REGISTERED VOTER POPULATION, RATHER THAN TOTAL CENSUS POPULATION

It might be helpful at this point to consider why the Constitutional Convention adopted registered voter population rather than total census population in its reapportionment of the House. The argument of appellant Governor that this was designed to achieve invidious results or to make political hay is without foundation in fact. Your Amicus, as a matter of record, argued strongly for the use of census population as the more appropriate measure, generally, since elected officials represent people, not just registered voters. Although he felt his argument was valid, it apparantly was not sufficiently persuasive, since he failed to get majority support from the delegates.

Amicus here, then a Convention Delegate, argued:

"ROBERTS. I would like to speak in opposition to the motion that we use registered voters as the basis for the application of equal proportions. There is a great deal of logic in the use of registered voters. It is something which is tangible, you can see it; it is something which does indicate that people have had the opportunity to go down and register, and they have indicated their interest in voting. There is just as much logic for the total votes cast. As a matter of fact a little more logic because these people actually went to the trouble of going down and casting their ballots. Now in a democracy you ought to pin a bouquet on people when they cast their ballots. I think it is a responsibility which they have, but you want to say in this thing, apparently, that you are favoring such a proposal.

I believe, however, that the proper basis for determination and distribution of the representatives should be on the basis of population. When a person comes into the House of Representatives, he isn't there to represent the people who cast their votes, he isn't there to represent the people who register, he is there to represent all of the people in that particular area, the total

population, the children who have not yet voted, the individuals, the youngsters who need taking care of, and those people who do not have the opportunity to or are too old to go to vote. The representative's job is to represent the entire population of the area. It seems to me, therefore, that population makes much more sense in terms of representative government.

There is a problem and I recognize the problem with regard to the census. That problem, however, is not an insurmountable problem. That problem can be resolved the way other states have resolved it. You reapportion your House and your Senate presumably every ten years. We said we are not going to reapportion our Senate. You reapportion the House every ten years on the basis of population. Now where do the other states get their figures? They have hundreds of districts the way we would have. All you've got to do, when the census people prepare their tabulation, is to let them know that you want them to tabulate the areas on the basis of population on the basis of the districts that you have. It is not an impossible problem, it is a very simple problem, and they will tabulate it for you on the basis of population, on the basis of the

districts that you want, and the problem can be resolved very easily. I, therefore, will vote against the proposal to use either the method of registration or votes cast." (Constitutional Convention Proceedings, Vol. II p.125)

The majority did not support this position because of the argument of the President of the Convention who pointed out that a study of the Legislative Reference bureau showed that the use of "*census population*" as against "*registered voter population*", did not result in any substantial difference in representation and that one of the reasons for previous failures of the legislatures to reapportion was the claim (valid or not) that proper census population data were not available for comparable political districts. (Proceedings. Delegate King, Vol II p.174.) Since information on registered voters was always at hand and current, and produced comparable results, it was an appropriate measure for use in the Constitution. Under all the circumstances, considering the full discussion at the Convention, it is clear that there was nothing invidious in the use of registered voter population in Hawaii in its reapportionment plan.

The Committee report points out that it did not use total citizen population as provided in the Organic Act because it was not possible to get the necessary population data. Although this may not be completely

correct in that no real effort appears to have been made by the legislature to secure the necessary data, it does explain in part why the Committee decided in favor of the use of registered voters. The Standing Committee Report No. 92 says: "*One of the reasons why the reapportionment directed by the Organic Act was not carried out was because that Act required reapportionment on the basis of citizen population. A breakdown of the population according to this standard has not been locally available. Total population figures for the Territory are shown by census tracts which do not necessarily coincide with locally defined areas. As a practical matter, the number of registered voters was found to bear a reliable and fairly uniform relationship to total population, although it favors slightly the neighbor islands where the percentage of persons who have registered to vote is from 1 to 2 percent higher than for Oahu. It was in recognition of the potential difficulty in obtaining figures which would show citizen population, or figures which would show total population by desirable districts, that the basis for apportionment of the members of the house was chosen as the number of registered voters.*" (Volume I, Proceedings of the Constitutional Convention, pages 250-251.)

This statement is clear and the suggested implications in the Governor's brief that the use of the registered-voters basis was designed for purposes of invidious discrimination is misleading.

The Standing Committee Report also makes it quite clear that the reapportionment of the house by the Governor was primarily a ministerial function since "*it appears highly improbable that any district in the next few decades will not be entitled, on the basis of registered voters to elect at least one representative.*" Then the report goes on to state on the same page, "*In order to insure that this duty, which is of ministerial nature, will actually be carried out, the Governor has been made specifically subject to mandamus by the Supreme Court. This is the only way in which a constitution can guarantee reapportionment and is consequently the method considered by this committee to be the most desirable.*" (Proceedings, Vol.I p.251.)

3 - THE CRITERION OF REGISTERED VOTER POPULATION IS NOT IN CONFLICT WITH REYNOLDS VS. SIMS.

The Governor's brief tends to confuse the issue by using a variety of years and figures to convince this Court that the plan of apportionment and the use of the registered-voters basis was somehow invidiously applied.

The argument further suggests that substantial inequities resulted from the application of that basis instead of population.

This court stated in Reynolds vs. Sims that the court would consider a plan to hold for at least a 10-year period if provision were made for periodic reapportionment approximately every 10 years. The Court stated in part:

> "Limitations on the frequency of reapportionment are justified by the need for stability and continuity in the organization of the legislative system, although undoubtedly reapportioning no more frequently than every 10 years leads to some imbalance in the population of districts toward the end of the decennial period and also to the development of resistance to change on the part of some incumbent legislators. In substance, we do not regard the Equal Protection Clause as requiring daily, monthly, annual or biennial reapportionment, so long as a State has a State has a reasonably conceived plan for periodic readjustment of legislative representation. While we do not intend to indicate that decennial reapportionment is a constitutional requisite, compliance with such an approach would clearly meet the minimal requirements for maintaining

a reasonably current scheme of legislative representation. And we do not mean to intimate that more frequent reapportionment would not be constitutionally permissible or practicably desirable. But if reapportionment were accomplished with less frequency, it would assuredly be constitutionally suspect." (Reynolds vs. Sims, 377 U.S. 533, (1964).

This Court further stated "*compliance with such an approach would clearly meet the minimal requirements for maintaining a reasonably current scheme of legislative representation.*" The period used in Hawaii is a ten-year period, and in spite of changes in registered voter population during the reapportionment periods, it is presumed under the court's decision that the apportionment which was valid in 1959 at the time when it was made would remain valid for the period until the next reapportionment.

When the House was reapportioned in 1959, pursuant to the Hawaii Constitution, there were 175,317 voters registered for the General Election in 1958. Dividing 175,317 by 51 (the number of house members) gives a theoretical number of voters that each member should represent as 3,437. The possible range would be from 1,719 voters to 5,155 voters for each representative district. This is true since a district having

one more than half of the theoretical number of registered voters would be entitled to 2 representatives when the registered voter population exceeded the theoretical number by one more than the theoretical number plus one-half of such number. When the 18 representative districts and the number of registered voters in 1958 are examined, it is clear that the representation for each member of the house is well within the permissible range:

Rep. District	1958 Reg. Voters	No. of House Members	Ratio of Members to Voters
1	2,209	1	1-2,209
2	13,836	3	1-4,609
3	2,986	1	1-2,986
4	3,862	1	1-3,862
5	2,641	1	1-2,641
6	2,560	1	1-2,560
7	14,195	4	1-3,548
8	13,876	4	1-3,469
9	5,929	2	1-2,964
10	12,926	4	1-3,231
11	10,525	3	1-3,508
12	8,372	3	1-2,791
13	7,621	2	1-3,810
14	14,134	4	1-3,533
15	21,063	6	1-3,510
16	13,746	4	1-3,436
17	13,455	4	1-3,364
18	11,381	3	1-3,797

The Governor's brief, moreover, does not note the impact of the large military population residing on military bases in the Fifth Senatorial District and the possible inclusion of tourists in the total census population figures. We have already noted that recent military action in Vietnam involved the movement of the 25th Hawaiian division to Vietnam.

The Court in Reynolds vs. Sims used the words--population, residence, citizens and voters--interchangeably but the emphasis appears to have been on the equality of voters rights-that there has to be *"some basic standard of equality among voters in the apportionment of seats in state legislatures."* 377 U. S. 533 (1964).

The use of the method of equal proportions, specified by the Hawaii Constitution, is obviously not in question since this process has been used by the Congress in apportioning the membership of the House of Representatives. Lawrence F. Schmeckebier in his book *"Congressional Apportionment"* published by the Brookings Institute in 1941 said:

"The method of equal proportions most nearly equalizes the average population per district and the individual share in a representative if the inequality is measured by the relative difference." (page 59.) *"A method of equal proportions tends to give the most equitable distribution among the states regardless of size."* (page 69.)

The record is also clear that there is no discrimination either as to eligibility or in registration of eligible voters in Hawaii. The registrars assist all who wish to register to vote. As a matter of fact, prior to elections, registrars are set up in major population centers in order to encourage registration and to obtain as large a number of eligible voters to register.

Amicus believes that the use of *"voter population"* is not discriminatory and does no violence to the federal constitution. We believe the use of registered voters is permissive under the Equal protection clause and the Court's opinion in Reynolds vs. Sims.

4 - IT MAY BE ARGUED THAT CENSUS POPULATION IS NOT A FAIR BASIS UPON WHICH TO DETERMINE EQUALITY OF VOTING POWER.

In a representative democracy, the theory is that each citizen is represented. This Court, in Reynolds v. Sims, 377 U.S. 533,565 (1964), stated this fundamental principle in the following language, "*Representative government is in essence self-government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies.---(Fair and effective participation) is concededly the basic aim of legislative apportionment ...*" (377 U.S., at 565-66.)

However, the Constitution of the United States was intended to be a practical document and its requirements are not theoretical. Judged by the standard of political reality, (and assuming no organized effort to prevent people from voting) census population may not be a fair basis upon which to determine equality of voting power unless each geographical unit has about the same number of voters. Otherwise, the voters in the district with fewer than the average number of voters will have an unfair advantage. For example, if there are five districts each having 5 legislators and each having a population of 1,000 but 4 districts have between 850 and 900 voters and 1 district has 400 voters, each of the

400 voters has about twice the voting power that each of the 850-900 voters has. If, in addition, the 400 voters habitually elect legislators of the same political party, their advantage may become even greater.

The District Court in its opinion already cited stated "*Hawaii is unique in many respects.*" Among such respects is the circumstance that in Hawaii the foregoing hypothetical example is the actual situation. This is demonstrated by the statistical information set forth on Page 7 of the Governor's Brief. If the relationship between 1964 registered voters and 1960 population in each of the six Senatorial Districts is determined, it will be seen that the relationship is about the same in the First, Second, Third, Fourth and Sixth but markedly different in the Fifth District, with the result that if population were the basis, each voter in the Fifth would have a vote of much greater weight, (in terms of the number of persons voted for) than the vote of a voter in any other District. This point is dramatically illustrated on Page 55 of the Governor's Brief, where it is stated that 1960 population would give the Fourth District 7 Senators and the Fifth District 13 Senators, whereas the 1964 registered voters would produce 9 Senators in each District. Based on 1960 population, a Fifth District vote would elect 2 Senators whereas a Fourth District vote would elect only 1 Senator.

The foregoing situation may be the hard core of the apportionment problem in Hawaii. The portion of the Fifth Senatorial District with installations such as Schofield Barracks, Pearl Harbor, Hickam Field and Tripler Hospital, contains thousands of military personnel and their families. Few are registered voters in Hawaii (see Governor's Brief, page 65). For years this geographical area has been almost solidly Democratic. As indicated, on a census population basis this area will elect twice as many Senators as on a registered voters basis. This will produce an even greater concentration of political power in the Democratic Party than presently exists. The two-party system is vital to our form of government. Inequities in apportionment which will sap the strength of the two-party system is contrary to our political philosophy. In addition, as noted by the District Court in its February 17, 1965 DECISION AND ORDER, "*the military population in the State fluctuates violently as the Asiatic spots of trouble arise and disappear.*" The District Court, in its opinion already cited, emphasizes the political realities of this situation in the following language "A *theoretical proposed redistricting of the City and County of Honolulu (Ex. 8) based on total population under the 1960 census, with the primary consideration being substantial equality of total population, gave Oahu 20 senators out of 25, and 41 representatives out of 51.*

(TR 189 - Schmitt) A result of such proposed redistricting was that the largest representative district in point of population would be the one that included Schofield Barracks *"in fact, it is completely Schofield Barracks,"* (TR 190) i.e., military population. Although it would thus become the largest representative district in the State, *"In point of registered voters it would be the smallest district on the island."* (TR 191)

C - SINGLE VERSUS MULTIPLE-MEMBER DISTRICTS

Amicus has previously noted that this question does not present a federal or constitutional question. At best, appellants are seeking an advisory opinion from this Court.

Since the question has been raised, and argued at length by appellants, the following observations may be in order: (1) Fortson v. Dorsey, suggests that ample latitude is available on the State level for the use of multiple-member districts in reapportionment, provided that such districts are not set up invidiously; (2) Appellant Governor has not effectively distinguished the Dorsey case to make it inapplicable to the situation in Hawaii; (3) The literature and pragmatic research on the subject of single versus multiple-member districts has hardly reached a level to make valid any conclusions on the relation of single or multiple-member districts to equality of voting rights or the representative character of State legislatures; (4) One authority suggests that the electoral system in use, rather than the single or multi-member district is the key factor in determining the representative character of a State legislature; (5) The proper evaluation of any system of districting should lie in the context of the operation of the individual State system, its historical development and the extent to which it serves well the needs of the people of

the State.

The Governor's brief (at p.72) admits "...*that in* Fortson v. Dorsey, 379 U.S. 433 (1964), *a system involving multimember districts employed in Georgia was held not to violate, on its face, the Equal Protection Clause.*" The effort to show that the situation in Dorsey is "*clearly distinguishable*", from Hawaii falls on its face. The Governor's claim that the districting in Hawaii is "*purely arbitrary*", is contrary to the record and the findings of the trial court below. The District Court found the basis in historical, geographic and political factors. This is supported by Defendant's brief in the District Court, dated November 17, 1964 which showed that the districts were set up on a sensible and rational pattern and were not designed to gerrymander or to discriminate.(Defendant's Brief, pp10-19) The District Court made the same finding.

The Governor's contention that the basis for the challenge is different from that in Dorsey, may be valid, but a challenge is not a distinguishing feature, or proof of the existence of discrimination or impairment of the right to vote.

The final argument in the Governor's brief, seeking to distinguish the Dorsey decision, is the question of the "*submergence of minorities within large multi-member districts.*" On page 72 the Governor's brief alleges (without proof) that "*In Hawaii, there is evidence of submergence of minorities.*"

On page 81 however, the Governor's brief admits that "...*extensive proofs were not put in as to the details of the submergence of minorities.*" The District Court made no findings that there was any "*submergence of minorities*" in Hawaii.

Concerning the literature it may be fairly stated that for many years, the literature of political science assumed and reiterated that single-member districts constituted the prevailing method for the election of state legislators. However, careful empirical research in 1955 established that the exceptions to this so-called "*rule*" were many, not few. As of that date, only 9 states chose all legislators from single-member districts, and in earlier years, the number of such was even smaller. Of even greater interest, is the "*newly discovered*" fact that, although only 12 per cent of all state senate seats reflected multi-member districts, 45 per cent of some 5,762 state house of representative members were selected from multi-member districts (in 36 states, including Nebraska).

Maurice Klain, "*A New Look at the Constituencies: The Need for a Recount and a Reappraisal,*" 49 American Political Science Review 1105-19 (December, 1955). See also, Ruth C. Silva, "*Compared Values of the Single-and the Multi-Member Legislative District,*" 17 Western Political Quarterly 504-16 (September, 1964), and by the same author, "*Relation of Representation and the Party System to the number of seats apportioned to a legislative district.*",

Western Political Quarterly (December, 1964).

Unfortunately, there has been little follow-up to test empirically the extent to which electoral results differ as between the single-member and multi-member districts which have long existed side-by-side on the state level in the U.S., perhaps because most political scientists still think the multi-member district is the rare exception. Thus, the hypothesis of most U.S. "*good government*" reformers (including Montesquieu) that the single-member district "*is better*" remains as untested as the general challenge to single-member districts in the U.S. made by James Bryce. However, one recent study of the multi-member districts in Pennsylvania contradicts at least one of the leading tenets of single-member district advocates -- namely a breakdown in the two-party system due to multi-member districts. "*There has certainly been no breakdown in the two-party system of the sort that some scholars predict as the price of multi-member districting.*"

Frank Sorauf, Party and Representation. New York: Atherton Press, 1963. (Co-winner of the 1962 Atherton Press Political Science Prize)

It is the belief of Amicus that much more careful and detailed study and research needs to be done in this area of political life. Existing studies are hardly sufficient to make a finding that single or multiple districts in the United

States will assure more representative government or better protect the will of the majority.

One authority who has written in this field suggests that the electoral system is the key factor to be studied rather than the single-versus multiple-member district. She says: *While the party system and the representative character of the legislature are related to the number of members apportioned to a legislative district, these relationships are indirect--and the electoral system used in the district is the link connecting the 'cause' with the 'results."* Ruth C. Silva "*Compared values of the single- and the multi-member Legislative District.*" Western Political Quarterly, September 1964 p. 516. See also James D. Barnett, "*Unitary-Multiple Election Districts*", American Political Science Review, February 1945, pp 65-67.

Professor Silva in the opening paragraphs of her recent article in the Western Political Quarterly cited above on the "*Relation of Representation and the Party system to the number of seats apportioned to a legislative district*", sums up her conclusions as follows:

"*The number of seats apportioned to a legislative district has been alleged to yield nine results. The single-member district, for example, has been said to produce localism, less able candidates, shorter legislative tenure, greater opportunity for gerry-mandering, weak and decentralized parties, an emphasis of candidates rather than on parties or issues, a*

particular kind of legislative responsibility to the electorate, a less representative legislature, and a two party rather than a multi-party system. The multi-member district allegedly produces nine opposite results. Both facts and logic show, however, that the first seven of these 'results' are spurious in the case of either the single-member or the multi-member district. Although the number of seats apportioned to a district does influence both the party system and the representative character of the legislature, the connecting variable is the electoral system used in the district."

"Analysis of the multi-member and the single-member constituency necessarily raises the question of the electoral system, which in turn raises a normative and more subjective question concerning the legislature's proper function. One electoral system may be suitable for a legislature that plays one role but may also impair the legislature's ability to perform other important duties." (Ruth C. Silva, in Western Political Quarterly, December 1964.)

The extent to which the Governor's brief goes to find a scintilla of "arbitrariness" and what it seeks to present to this Court as "evidence" are almost amusing. For example, to support the claim that the district lines are arbitrary the Governor's brief on p. 74, states that the Governor cannot, under the terms of the Constitution, change the district

lines, and that he may do so "*only as a last resort - when on a mathematical basis the indicated apportionment in a Representative District falls below one-half of a representative, is there to be any change of the district lines.*" This is a correct statement of what the State Constitution provides, but the conclusion which the Governor's brief arrives at from this fact is completely erroneous. The Governor's brief holds that "*this provision...appears (to be) confirmatory evidence of arbitrariness.*" The district lines were fixed to prevent the Governor or anyone else from gerrymandering. The delegates reserved to themselves the right to determine when and how to redistrict. The State Constitution provides for constitutional amendment or revision by a convention, and subsequent approval by referendum of the people. The Committee Report of the Convention pointed out the slim likelihood of the Governor having to redistrict under the '*ministerial*' functions assigned to him under the Constitution. The lack of knowledge shown in the Governor's brief about the purpose and intent of various provisions of the State Constitution is distressing.

Amicus is of the belief that Appellants have made no showing of any discrimination or arbitrariness or invidious effect of the districting under the Hawaii Constitution. In the light of the limited knowledge of the impact of single versus multi-member districts and the basis for the establishment of districts in Hawaii, the appropriate balance of single as against multi-member districts; or for that

matter a unicameral versus bicameral legislature; the number of legislators; the terms of office etc, are matters appropriately left for the next Constitutional Convention. Amicus urges this Court to uphold the February 17, 1965 decision of the District Court, and to require prompt implementation of this Court's June 1964 decisions.

V - CONCLUSIONS

Amicus believes that the litigations involving Reapportionment in Hawaii have not been adversary proceedings. He believes that Appellants did not file a timely appeal to the February 17, 1965 Order of the District Court; that the Governor per se has no standing before this Court and that the issues presented by Appellants are requests for advisory opinions and do not present substantial federal questions.

The only question is whether it was an error for the District Court to have decreed that the Legislature of Hawaii should adopt legislation pursuant to Article XV of the Constitution of the State of Hawaii, providing for submission to the people of Hawaii the question *"Shall there be a convention to prepare a revision of or amendments to the Constitution?"* and for any and all acts required by law to implement such legislation, and further providing in the event of an affirmative vote, for election of delegates to a constitutional convention and for an election on any proposed amendments adopted by the constitutional convention, said amendments including, but not limiting the convention thereto, provisions reapportioning the Senate of Hawaii on a Constitutionally valid basis." Amicus believes that the District Court's Decision was correct, namely that "...any change in the representation from any senatorial district must be by constitutional amendment. This Court concurs!"

For the foregoing reasons the appeals should be dismissed and the February 17, 1965 order below affirmed.

Respectfully submitted

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Petitioner

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Counsel

January 1966

ADDENDUM:

Amicus on review of his brief has noted that he failed to comment on the question as to whether the apportioning of delegates to the Constitutional Convention required by the District Court Order of Feb. 17, 1965, would have to conform to the *"substantially on the basis of population"* criteria set out by the Court for legislative apportionment.

The District Court decision accepted the provisions of the State Constitution as adequate under the circumstances. It should be noted that the 1950 Constitutional Convention gave Oahu a majority of the delegates. Under the Constitution the delegates left the Legislature free to determine the number of delegates, the districts etc., in the calling of future conventions. In anticipation of a deadlock, however, the delegates had the foresight to set out the procedures--namely *"as nearly as practicable"* as that required for the 1950 Convention. (Article XV, Sec. 2)

An attempt to draw a direct parrallel between the criteria for legislative apportionment and Constitutional apportionment is questionable. The people of the State have a final review and veto power over proposed Constitutional amendments or revisions, they do not have such veto power over legislative enactments. Additionally States may set up Constitutional Commissions to propose revisions of their Constitution. To suggest that such a Commission be apportioned on the basis of population would be stretching the import of Reynolds v. Sims.

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

Nos. 318, 323 and 409

JOHN A. BURNS, Governor of the State of Hawaii,

Appellant,

—v.—

WILLIAM S. RICHARDSON, *et al.*,

Appellees.

ELMER F. CRAVALHO, *et al.*,

Appellants,

—v.—

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KAZUHISA ABE, *et al.*,

Appellants,

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ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

BRIEF FOR ELMER F. CRAVALHO, *ET AL.*

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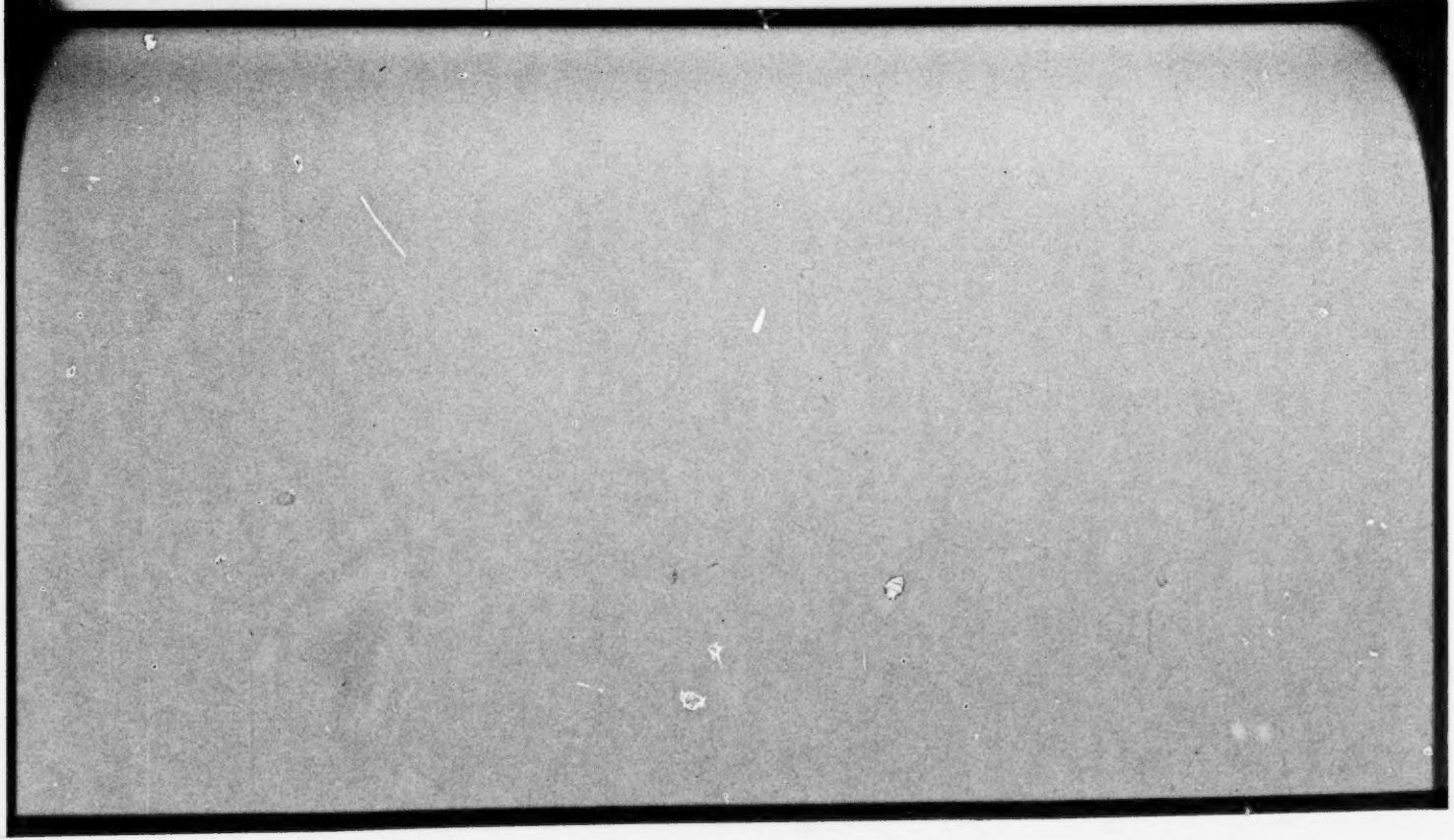

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IN THE

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OCTOBER TERM, 1965

Nos. 318, 323 and 409

JOHN A. BURNS, Governor of the State of Hawaii,
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ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

BRIEF FOR ELMER F. CRAVALHO, *ET AL.*

OPINIONS BELOW

The opinion of the District Court dated February 17, 1965 (R. 62-81) is reported at 238 F. Supp 468. Its opinion dated April 28, 1965 (R. 151-65) is reported at 240 F. Supp. 724.

JURISDICTION

This action was brought under 42 U.S.C. §§ 1983, 1988, 28 U.S.C. § 1343 and 28 U.S.C. §§ 2201, 2202 for a declaration of the invalidity and for preliminary and permanent injunction to enjoin the enforcement of the provisions of the Constitution of the State of Hawaii relating to the apportionment of the Senate and House of Representatives of the Hawaii Legislature on the ground of their repugnancy to the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. (R. 1-29)

The District Court's first order dated February 17, 1965, was entered April 9, 1965. The second order was dated and entered April 28, 1965. The second order reinstated certain provisions of the first order, which in the interim had been temporarily suspended.

Elmer F. Cravalho, *et al.*, filed their Notice of Appeal on May 7, 1965. (R. 184-87)

The Supreme Court of the United States has jurisdiction to review the orders on direct appeal under 28 U.S.C. §§ 1253 and 2101 (b).

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

1. Amendment XIV, Section 1, Constitution of the United States.

2. Article III, Sections 1, 2, 3, 4, 5, and 11, of the Consti-

tution of the State of Hawaii, Revised Laws of Hawaii 1955 (1963 Supp.), p. 10 *et seq.*, relating to the apportionment of the Hawaii Senate and House of Representatives and the sessions of the Hawaii Legislature.

3. Article XVI, Section 1, of the Constitution of the State of Hawaii, Revised Laws of Hawaii 1955 (1963 Supp.), p. 22 *et seq.*, which sets forth a schedule of the representative districts and the number of representatives to be elected from each district.

4. Article XV of the Constitution of the State of Hawaii, Revised Laws of Hawaii 1955 (1963 Supp.), p. 21 *et seq.*, relating to the methods of revision and amendment of the Hawaii Constitution.

5. Act 281, Regular Session 1965, Third Legislature of the State of Hawaii, which is the Hawaii Senate Reapportionment Plan. (R. 113-18)

The above are set forth in Appendix A, pp. 1a-20a.

QUESTIONS PRESENTED

1. Does the Equal Protection Clause necessarily require that the Hawaii Senate be apportioned in accord with a rule of single-member districts, where the House of Representatives, with single-member and multi-member districts, has been found to be constitutionally apportioned, so that the Legislature would have the burden of justifying that a total apportionment scheme with multi-member districts in both houses does not operate to minimize or to cancel out the voting strength of political, social, economic, or racial elements of the voting population and the burden of justifying that the two houses complement each other in accord with the United States Constitution?

2. Does the fact that the geographical boundaries of certain districts of one house of a bicameral legislature of the State of Hawaii are identical to, or coincide to a great degree with, the geographical boundaries of certain districts of the other house violate the Equal Protection Clause?

3. Should this Court vacate the District Court's injunction against the legislators from enacting any legislation until legislation looking toward the convening of a constitutional convention to propose amendments to the Hawaii Constitution (to be then submitted to the electorate) effecting reapportionment of the Senate, has been passed?

4. Where certain provisions of the Hawaii Constitution relating to the apportionment of the Hawaii Senate are invalid, does the Legislature of the State of Hawaii have the authority to enact at least temporary reapportionment legislation relating to the Hawaii Senate, pending the adoption of valid amendments to the Hawaii Constitution providing for the reapportionment of the Hawaii Senate in accord with the United States Constitution?[1]

5. Does the reapportionment plan for the Hawaii Senate which the Legislature of the State of Hawaii submitted to the District Court on April 14, 1965, pursuant to the order of the District Court, violate the Equal Protection Clause?

STATEMENT OF THE CASE

The case was instituted in the United States District Court for the District of Hawaii under 42 U.S.C. §§ 1983, 1988, 28 U.S.C. § 1343 and 28 U.S.C. §§ 2201, 2202 by Complaint filed on August 13, 1964, by the original plaintiffs

[1] With respect to this question Elmer F. Cravalho, *et al.*, agree with the argument of Governor John A. Burns, in his Brief, pp. 86-90. (References to the Governor's Brief are hereafter "Gov. ")

Henrietta Davidson Holt, *et al.*, as citizens, taxpayers and electors of the State of Hawaii, on their behalf and on behalf of others. (R. 1-29) The Complaint sought a declaratory order that Sections 2, 3 and 4 of Article III, Section 1 of Article XVI, and the proviso at the end of the sixth paragraph in Section 2 of Article XV of the Hawaii Constitution which dealt with the apportionment of the Hawaii Legislature had deprived and continued to deprive the complaining citizens of liberty and property without due process of law and of the equal protection of the laws, all in violation of the Fourteenth Amendment of the United States Constitution. (R. 11)

The Complaint also sought an injunction against the Lieutenant Governor of the State of Hawaii, the officer charged with the responsibility for supervision of State elections, prohibiting him from proceeding with the 1964 general election until such time as the Hawaii Legislature had been reapportioned to the satisfaction of the District Court. (R. 11-12) Failing satisfactory reapportionment through the efforts of the Legislature itself, the Complaint requested that the District Court undertake to reapportion the Legislature. (R. 13)

On August 24, 1964, John A. Burns, Governor of the State of Hawaii, (appellant in No. 318) intervened as intervenor-plaintiff, (R. 37-41) and Nelson K. Doi, *et al.*, (now Kazuhisa Abe, *et al.*, appellants in No. 409) being certain State senators, intervened as party defendants. (R. 42-48)

On that same day Elmer F. Cravalho, *et al.*, (appellants in No. 323) being certain members of the Hawaii House of Representatives, intervened in the case below as party defendants, with a view to making the position of the House known to the District Court and facilitating the reapportionment. (R. 49-53)

On August 26, 1964, a three-judge court, convened pur-

suant to 28 U.S.C. § 2281 *et seq.*, denied the prayer of the plaintiffs Henrietta Davidson Holt, *et al.*, to enjoin the conduct of the 1964 election for State legislative offices, and the District Court thereafter held a full hearing on the Complaint in January, 1965.

On February 17, 1965, the District Court filed its Order, entered April 9, 1965, adjudging those certain provisions of Article III, Section 2 of the Hawaii Constitution fixing the number of senators per senatorial district and the said proviso of Article XV, Section 2 relating to the amendments affecting representation in the Senate were unconstitutional and invalid (R. 79; 238 F. Supp., at 478) and also holding that any change in the representation from any Hawaii senatorial district must be by constitutional amendment and not by statute. (R. 78; 238 F. Supp., at 478) The Order also denied the prayer of the Governor to enjoin the 1966 election but provided, in lieu thereof, relief prompting reapportionment by enjoining the legislators, including Elmer F. Cravalho, *et al.*, from enacting any legislation until legislation pursuant to the provisions of Article XV of the Hawaii Constitution providing for the submission to the people of Hawaii by special election to be held not later than August 1, 1965, the question: "Shall there be a convention to propose a revision of or amendments to the constitution?", and for any and all acts required by law to implement such legislation, has been enacted into law. (R. 80; 238 F. Supp., at 479)

On March 1, 1965 Elmer F. Cravalho, *et al.*, and Nelson K. Doi, *et al.*, (now Kazuhisa Abe, *et al.*) through counsel jointly filed a motion to alter or amend judgment to allow the Hawaii Legislature to propose and submit to the District Court for its approval a reapportionment plan of the Hawaii Senate providing thereby an opportunity to avoid the costly and circuitous route of accomplishing reapportionment at a

constitutional convention. (R. 82-88) The court below granted the said motion and by Order of March 9, 1965, entered March 19, 1965, provisionally amended Paragraph 4 of its Order of February 17, 1965 (which had not at that time been entered) to permit the Legislature (a) to enact a provisional reapportionment and redistricting plan for the Senate; (b) to adopt a proposed constitutional amendment embodying pertinent provisions of the foregoing reapportionment and redistricting plan for submission to the electorate at the 1966 general election; and (c) to enact legislation to submit to the electorate the question: Shall there be a convention to propose a revision of or amendments to the constitution? This Order, like the one of February 17th, demanded that the plan be approved by the District Court; failing approval, the Order of February 17th demanding legislation for implementing a constitutional convention would again become effective. (R. 88-91)

On March 18, 1965, the Legislature advised the District Court that a provisional reapportionment and redistricting plan for the Senate, in substance approved by both Houses, was then in conference committee and about ready to be presented to the District Court, whereby the Senate was reapportioned by dividing the State into the same original and existing six senatorial districts, changing only the number of senators allocated to each district, based upon the use of the method of equal proportions. (R. 153-54; 240 F. Supp., at 726) By that March 18th plan, the senators were apportioned as follows: (R. 154; 240 F. Supp., at 726)

County	Senatorial District	No. of Senators
Hawaii	First	2
"	Second	1
Maui	Third	2
Oahu	Fourth	9
"	Fifth	10
Kauai	Sixth	1

The Legislature quickly thereafter was informally made to understand by the District Court that such a grossly lumpy apportionment of senators, whereby forty per cent of the entire Senate would come from one senatorial district and thirty-six per cent from another alongside, could never be approved, and the plan was forthwith withdrawn from conference committee for reconsideration by the House. (R. 154; 240 F. Supp., at 726) Shortly thereafter, the District Court informally indicated that because Hawaii had a multi-member district House, the District Court would require a rule of single-member districts for the Senate so that any other than single-member senatorial districting would have to be justified to the District Court. (R. 154; 240 F. Supp., at 726) And in its Decision and Order of April 28, 1965, the District Court below ultimately decided that this rule of single-member districts was the "means by which the Senate could be apportioned to give to every voter the equal protection and equal representation that he is entitled to without disturbing the makeup of the house." (R. 162; 240 F. Supp., at 731)

1. The Proposed Provisional Plan

Pursuant to the Order of March 9, 1965, entered March 19, 1965, and after the informal advice of the District Court with respect to the March 18th plan and the rule of single-member districts for the Senate, the Legislature, on April 14, 1965, passed and sent to the District Court the following bills: (a) H. B. 987,[2] the proposed provisional senatorial

[2] The provisional senatorial reapportionment plan (H. B. 987) was passed by both houses of the Hawaii Legislature and submitted to the Governor of Hawaii for approval. The Governor neither approved nor vetoed the bill within the period provided in the Hawaii Constitution. Therefore, on July 26, 1965, the bill became law without the Governor's signature. Act 281, Regular Session 1965, Third Legislature of the State of Hawaii. (Appendix A, pp. 15a-20a)

reapportionment plan; (b) H. B. 773, the proposed constitutional amendment embodying that same plan; and (c) H. B. 986, submitting to the electorate in the 1966 general election the question of the calling of a constitutional convention. (R. 103-04) By H. B. 987, the State was divided into eight senatorial districts, *viz.:* (R. 120-21, 154; 240 F. Supp., at 727)

County	Senatorial District	No. of Senators	1964 Registered Voters per District
Hawaii	First	3	28,130
Maui	Second	2	18,786
Honolulu	Third	3	27,073
"	Fourth	4	35,780
"	Fifth	4	39,361
"	Sixth	4	40,629
"	Seventh	4	37,336
Kauai	Eighth	1	12,266

The reports of the conference committee on the proposed provisional plan (H. B. 987), as well as the proposed plan for the constitutional amendment (H. B. 773) embodying the same setting forth the conference committee's reasons for redistricting the Senate on a multi-member district basis were also presented. (R. 105-11, 119-29)

Substantially all the evidence concerning the proposed provisional plan (H. B. 987) were covered by the report of the conference committee which considered and reported the bill out, the testimony of Sakae Takahashi and the testimony of Robert Schmitt.

a. The Conference Committee Report

The conference committee report on H. B. 987[3] covering the proposed provisional senatorial reapportionment plan

[3] The conference committee report on H. B. 987 incorporates the conference committee report on H. B. 773. (R. 111)

(hereinafter called the "Senate plan") set forth the bases and considerations on which the Senate plan was founded. (R. 123-28) According to the conference committee report, the committee first determined against a single-member districts rule in favor of multi-member districts because of its deep concern that single-member districts have a tendency to foster primary concern with local issues and to "fragment the approach to statewide problems and programs... to the detriment of the State as a whole." (R. 123) The committee believed that multi-member districts would provide a means toward "increasing the significance of an individual's vote by focusing the individual's attention on a broad spectrum of major community problems as opposed to those of more limited and local concerns." (R. 124) The committee's preference for multi-member districts was in part also prompted by history and tradition of a member of the House having a shorter term, representing a smaller constituency and being of a numerically larger body than a member of the Senate, and this experience had proved a desirable balance and "meaningful in achieving the concept of bicameralism initially sought by the constitutional convention." (R. 123) It recognized the probability of significant population shifts suggested by the rapid development of residential subdivisions on the island of Oahu which shifts in turn would necessitate more frequent reapportionment and readjustments of district lines in the case of single-member districts. (R. 125) It felt that too large a number of senators from one district or too large a number of vacancies to be filled in the same election from one district might confuse and make difficult intelligent voter selection (R. 124), but also felt that two-member districts for Oahu would not alleviate the worries of single-member districts and that three-member districts ought to be avoided because the districts would then approach the population and geographical

sizes of the House representative districts, a similarity which may have a negative effect on the complexion of bicameralism. (R. 127-28)

In the formulation of the Senate plan the committee attempted to "apportion one senator to every 9,500 registered voters." (R. 126) Aside from numerical parity, the district lines of the first, second and eighth senatorial districts corresponded to and maintained the boundaries of the existing counties of Hawaii, Maui and Kauai.[4] (R. 125) The recognition of the counties was intended to "assure some voice to the counties as political subdivisions" inasmuch as they had been historically administered separately and were physically insulated from each other. (R. 125) The county and island of Hawaii which heretofore was composed of two senatorial districts was made into one senatorial district "prompted in large part to equalize the registered voter population of that island with the districts on Oahu to the extent possible." (R. 127)

With respect to the City and County of Honolulu (island of Oahu), numerical parity of one senator to every 9,500 registered voters was again the equal population standard. (R. 126) In drawing the district lines, the committee "relied very heavily on the standards of compactness and contiguity." (R. 126) The Koolau Mountain Range determined the boundaries of the third senatorial district, being all of the "windward side" of Oahu. (R. 126) Although the boundaries of the third senatorial district coincided with the eighth representative district, the committee believed that

[4] Hawaii county is made up of the island of Hawaii; Maui county is made up of four islands in close proximity being the islands of Maui, Molokai, Lanai and Kahoolawe; Kauai county is made up of two islands in close proximity being the islands of Kauai and Niihau; and the City and County of Honolulu is made up of the island of Oahu.

the well-defined geographical separation by the Koolau Mountain Range was controlling in this instance. (R. 126) The fourth senatorial district was generally made up of the "leeward side." (R. 126) The fifth, sixth and seventh senatorial districts were bounded by "lines running from the Koolau Range to the ocean along well-defined and long established representative district and precinct lines." (R. 126) Although cognizant of the widest disparity between the fourth senatorial district, entitled to four senators, with 35,780 registered voters (8,945 per senator) and the sixth senatorial district, entitled to four senators, with 40,629 registered voters (10,157 per senator), the committee elected not to favor the cause of arithmetical consistency over compactness, contiguity and community of interest as it would have "meant the splitting of the heart of the Kalihi community and adding a portion thereof to the leeward Oahu communities which are geographically removed from and foreign to Kalihi." (R. 126-27)

The committee believed that the bases applied in the reapportionment and redistricting scheme under the Senate plan achieved districts "as nearly of equal population as is practicable" and provided "fair and effective representation to all citizens." (R. 128)

b. Testimony of Sakae Takahashi

Sakae Takahashi, a Hawaii State senator and vice-president of the Hawaii Senate and chairman of the senate judiciary committee, served as chairman of the conference committee which considered the Senate plan. (R. 293-94) He testified as a member of the conference committee to explain and amplify the reasons for the actions of the committee. (R. 294)

Senator Takahashi testified in favor of the Senate plan.

(R. 306) In addition to the clarification of the matters set forth in the committee report, he stated that the committee did not discuss the complete redistricting of the House to make the House single-member districts (R. 297), nor discuss the fact that there were multi-member districts in the House. (R. 298) Discussion, if any, in this respect was that the "House districting plan would be left alone." (R. 311) The position taken by the committee was that there was "nothing wrong with having multi-member districts in the Senate and multi-member districts in the House." (R. 298)

Senator Takahashi also identified the residences of Senators Esposito, Porteus and Fukushima within the fifteenth representative district (R. 302-03) and delineated also the residences of Senators Ariyoshi, Kido and Takahashi within the twelfth representative district (R. 308) and the residences of Senators Hulten and Pryor within the eighth representative district. (R. 308-09)

c. Testimony of Robert Schmitt

Robert Schmitt, statistician, (R. 201) testified that the number of senators apportioned to the several senatorial districts on the basis of the 1964 registered voters under the Senate plan was correctly computed under the method of equal proportions. (R. 317) His opinion was that "on the basis of substantial equality of the number of registered voters, on the use of long standing statistical and taxation and land division boundaries, on contiguity and compactness, the districts seemed to be well thought out." (R. 317) More specifically as to certain district lines he commented as follows:

> *Third senatorial district*—"the windward side consisting of Koolauloa and Koolaupoko judicial districts has

formed a unit since earliest antiquity;" (R. 321) "has long been used for statistical analysis . . . [and] happens to be consistent to the 9th Tax Zone on this island" [Oahu]. (R. 321)

Fourth senatorial district—"the breakdown between the 4th and 5th Senatorial Districts, which runs between Fort Shafter and Kalihi, is also a long-standing boundary." (R. 321) "[We] have defined here in the 4th District an area of community of interest, of similar occupational background, that is, largely Armed Forces and their dependents, plus many civilian employees of Pearl Harbor, Barber's Point and Schofield Barracks. And it does provide a very meaningful boundary." (R. 322)

Fifth senatorial district—"breakdown of the 5th and 6th Districts deviates from an existing political boundary. However, it is quite close to the boundaries used in census tract statistics by the United States Bureau of the Census. It also very neatly separates Kakaako from the central business district and it does seem to provide for a clear distinction between areas of different social and housing, economic characteristics." (R. 323)

Sixth and seventh senatorial districts — "division between the 6th and 7th Districts, with the exception of a small jog in the St. Louis Heights area, is identical to that between the 2nd and 3rd Taxation Zones. It corresponds to an old ahupua[a] line and has been used for statistical purposes. . . . [T]here is a considerable difference between the typical residences on the Koko head side [east] of Diamond Head as distinguished from the residences Ewa [west] of it. For example, the 6th District has most of the apartments, residential structures in Hawaii. The area on the Koko head side [east] of

the 7th District is primarily a single family housing district." (R. 323)

First senatorial district—The trend is a growing population for West Hawaii and a declining population for East Hawaii at such a rate that would tend to affect representation that would require more frequent districting than every ten years. Election at large as one district would effectively compensate population shifts within the county. (R. 324)

Mr. Schmitt also testified that the statistical "law of large numbers" might be a consideration in the use of multi-member districts rather than single-member districts. (R.318) He explained that a large number of small districts would be subject to considerable fluctuation in a short period of time in the number of registered voters whereas a small number of large districts would proportionately be subject to much less fluctuation in the number of registered voters so that areas of growth or declining population would tend to balance each other out over a period of a decade. (R. 318)

With respect to the character of the populace within the districts, Mr. Schmitt testified on cross-examination that the fifteenth representative district (portion of the sixth senatorial district) was heterogeneous from the standpoint of race, income and occupation. (R. 329) The fifth senatorial district was substantially composed of the twelfth, thirteenth and fourteenth representative districts. (R. 133) Mr. Schmitt described the upper part of Nuuanu in the fourteenth representative district as "a very distinct socio-economic area" with the highest proportion of wealthy widows. (R. 330) The people in the fourteenth were ethnically quite different with divergence in income and occupational status as well. (R. 330) The thirteenth had very little of the upper socio-economic status with a high percentage of persons of

Asiatic ancestry constituting more in the laboring class than those in the twelfth. (R. 330) The sixteenth and seventeenth representative districts which made up the seventh senatorial district contained heterogeneous classes of people with low-income Palolo Valley laborers and clerical workers to high income Waialae-Kahala professionals and managerial group. (R. 331)

2. Decision and Order on the Senate Plan

The court below, by its Decision and Order of April 28, 1965, held that the Senate plan failed to give each voter of the State of Hawaii the fundamental equality of representation to which each is entitled under the Fourteenth Amendment. (R. 162-63, 164; 240 F. Supp., at 731-32) The court below described the creation of boundaries of the third senatorial district which were identical to the boundaries of the eighth representative district and the creation of the boundaries of the sixth senatorial district which coincided to a great degree with those of the fifteenth representative district as "monolithic political units" or "monoliths". (R. 160; 240 F. Supp., at 730) A monolith, the court below stated, provides for the election of representatives and senators from one political and geographical unit all responsible to and representing exactly the same constituency (R. 160; 240 F. Supp., at 730) so as to "concentrate and intensify the voting power of a single senatorial-representative district to the point that voters therein have a built-in disproportionate representational advantage over any other voters of the State." (R. 159; 240 F. Supp., at 729) And the court emphasized that "[s]uch artificially concentrated political power negates any notion of equality of representation for the minorities entrapped therein, as well as for all other electors of the State outside such monolithic political unit."

(R. 160; 240 F. Supp., at 730) The court below concluded that "there should not be any monolithic political units of representation in that all inclusive system of apportionment" (R. 160; 240 F. Supp., at 729) lest the "demanded differing complexions and collective attitudes [in the house and senate] are lost." (R. 160; 240 F. Supp., at 729-30)

Additionally, the court below stated that "[t]here can be no truly representative government without a system of apportionment which provides potentially equal representation to the divergent factors incorporated within the body politic" (R. 158; 240 F. Supp., at 729) and that the Legislature failed or ignored to consider certain factors in setting up the senatorial districts. The court below stated: (R. 161; F. Supp., at 730)

> "While it is a fundamental factor under the decisions of The Court, population is not the sole definitive measure for setting up either representative or senatorial districts. Compactness and contiguity of the territory are admittedly also factors, but community of interests, community of problems, socio-economic status, political and racial factors—each and all must be considered, and not only must the electoral districts be laid out with the totality of those factors having been taken into consideration, but even more, the sum total of all of the districting must result in substantial equality of meaningful representation to each and all of the voters of the State. 'All who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income and whatever their home may be in that geographical unit. *Gray* v. *Sanders*, 372 U. S. 368, 378.'"

and further stated: (R. 156; F. Supp., at 728)

> "Apparently, ethnic, political, industrial, economic, social, occupational factors, and community of interests and problems were given little if any consideration by the Legislature."

The court below did not dispute the fact that the Legislature used, at least, the bases of registered voters, geographical boundaries, historical representative district lines, compactness and contiguity. (R. 156; 240 F. Supp., at 727-28) It was never contended that there was not substantial equality of registered voter population among the eight senatorial districts under the Senate plan and the District Court agreed that the number of registered voters per senatorial district conformed to the standards required under the method of equal proportions prescribed by the Constitution of the State of Hawaii. (R. 155; 240 F. Supp., at 727)

Finally, the court below found "that the present multi-member district scheme of senatorial reapportionment resulted in a material part at least, from gerrymandering." (R. 163; 240 F. Supp., at 732) This finding was based on the "probability" that "[t]o have crosscut any of Honolulu's eighth, twelfth or fifteenth representative districts in order to mark out single-member senatorial districts would, with practical certainty, have left two or three present incumbents to compete head on for a single senatorial seat." (R. 163; 240 F. Supp., at 731) The court below also found that the "same factor of political self-preservation" motivated the districting of Hawaii county as an entirety. (R. 163; 240 F. Supp., at 731)

The court below also reviewed the testimony of Robert Schmitt but stated that "[h]e, however, had *not been consulted* on the problem of the multi-member districts vs. single-member, or the problem of district lines." (R. 156; 240 F. Supp., at 728)

The court below found that the Senate plan failed to meet the test of equality of representation set down by this Court and disapproved the plan. (R. 164; 240 F. Supp., at 732) Thereupon the lower court reinstated item 4 on pages 19-20, and item 6 on pages 20-21 of the Decision and Order of that court dated February 17, 1965, which enjoined the legislators from enacting any legislation until legislation for the calling of a constitutional convention shall have been enacted. (R. 164; 240 F. Supp., at 732) On application of May 13, 1965 by the Governor, Mr. Justice Douglas, on May 21, 1965, granted a stay of the District Court's injunction pending the issuance of the judgment of this Court.

SUMMARY OF ARGUMENT

I

In its proposed Senate plan, the Hawaii Legislature constructed multi-member senatorial districts with the apportionment of senate seats and the drawing of district lines based primarily on substantial equality of population,[5] boundaries of existing political subdivisions, compactness and contiguity, and historical and natural boundaries. The court below concluded as much. In passing upon the constitutionality of the Senate plan, however, the court below, noting that the Hawaii House of Representatives was composed of single-member and multi-member districts, imposed a rule of single-member districts, the deviation from which, the court insisted, must be justified with consideration of the totality of racial, socio-economic, occupational, political and community of interest factors in addition to the bases of population, compactness and contiguity, and historical

[5] The Hawaii Legislature utilized the registered voter population basis in the Senate plan pursuant to Final Order on Motion to Alter or Amend Judgment dated March 9, 1965. (R. 89)

and natural boundaries which were considered by the Hawaii Legislature. The court below also condemned the "monolithic political unit", where the boundaries of the district of one house are identical to or coincide to a great degree with the boundaries of a district of the other house, as giving the majorities within such districts a disproportional monolithic command over entrapped minorities and over voters in non-monolithic districts.

The court below did not apply the proper constitutional standard in (1) imposing a rule of single-member districts thereby requiring the Hawaii Legislature to justify the multi-member districts with racial, socio-economic, political, occupational and community of interest factors and (2) holding that the monolithic political unit is unconstitutional.

A. Single-member districts may be the rule in one State, while another State might desire to achieve some flexibility by creating multi-member or floterial districts. There is no rule of constitutional preference for single-member districts. The Hawaii Legislature desired and pursued the creation of multi-member districts. The Governor who opposed the Senate plan has the burden of demonstrating that the multi-member districting scheme operates to minimize or cancel out the voting strength of racial or political elements. The record is barren of any such demonstration that the Senate plan operates to minimize or cancel out anyone's voting strength in the overall representation accorded to the State's voters in both houses of the Hawaii Legislature.

The showing by the Hawaii Legislature that it utilized the basis of population as the controlling factor together with the usual and permissible bases of political subdivisions, compactness and contiguity, and natural and historical boundaries for the Senate plan was sufficient. In the absence of evidence showing that such bases were not em-

ployed, the Legislature was not obliged to further justify the multi-member districts with racial, socio-economic, political, occupational and community of interest factors. All principles and circumstances concerning such factors which reasonably may be conceived to justify and uphold the Senate plan are presumed to exist in favor of the validity of the legislative act. Moreover, the Hawaii Legislature was under no duty to consider race which is a constitutionally impermissible basis. The opponents of the Senate plan must demonstrate that the Senate plan operates to minimize or cancel out the voting strength of racial and political elements of the voting population.

B. The District Court's conclusion that the "monolithic political units" violate the Equal Protection Clause is entirely hypothetical. Where the geographical boundaries of certain districts of one house are identical to, or coincide to a great degree with, the geographical boundaries of certain districts of the other house, this situation results in the so-called monolithic political units. Every voter and every constituency in the State, not only the voters and constituencies in the monolithic districts, would elect senators and representatives, who represent them and who must be vigilant to serve their interests in both houses. And the record never showed the minimization of the voting strength of any racial, political, social or economic minorities within the monolithic districts.

C. The District Court's injunction against certain parties, including Elmer F. Cravalho, *et al.*, from enacting any legislation until certain reapportionment legislation satisfactory to the District Court has been passed should be vacated as unnecessary if this Court approves the existing House apportionment and the Senate plan as a whole. And if this Court finds that one or both houses are invalid, this Court should nevertheless vacate the injunction and remand to the Dis-

trict Court for reconsideration of the desirability and need for such a drastic remedy, in light of the decision and rulings of the Court in these consolidated appeals and the situation at the time of the issuance of such judgment.

II

A. Notwithstanding the invalidity of the provisions fixing the number of senators per senatorial district, the District Court has discretion to and did properly determine the validity of the apportionment of the Hawaii House of Representatives in the cause of affording necessary guidelines to the Hawaii Legislature. In *Fortson* v. *Dorsey*, 379 U.S. 433 (1965) this Court did not deem it unwise to answer substantial questions relating to Georgia's senatorial reapportionment at a time when the Georgia House of Representatives had been declared unconstitutional. *Fortson* v. *Toombs*, 379 U.S. 621, Appendix A at pp. 639-40 (1965).

Additionally, having found that there was no evidence to show that the Constitutional Convention would have apportioned the House in any other way than it did, the District Court held the provisions of the House apportionment severable from those of the Senate apportionment and properly determined the validity of the House apportionment.

B. The question of whether or not the District Court properly determined the validity of the House because of the alleged inseverability of the malapportioned Senate is now moot. This Court has before it the new Senate plan and the existing House apportionment which together constitute the bicameral system as a whole the validity of which is the subject of the several appeals at bar.

C. The District Court correctly held that the use of registered voters as a basis of apportionment did not, in Hawaii,

in fact designedly or otherwise operate to minimize or cancel out the voting strength of any elements of the voting population.

If total population were held to be the only basis for apportionment in Hawaii, the apportionment would result in gross inequity among citizens of the State eligible to vote particularly because of the large and fluctuating military population stationed and concentrated within a few legislative districts. The especially fluctuating circumstances of the military population in Hawaii render the total population figure an unstable, temporary and fleeting statistic. Moreover, those districts favored with the presence of the military provide breeding grounds for "rotten boroughs" where population is large and the number of voters is small. Additionally, the voter's vote in such districts would be weighted heavily and inequitably in his favor as against a vote of a voter living without such districts.

The registered voter basis provides a rational and suitable means of adjusting the apportionment base by excluding therefrom those of the military who are, by choice or circumstances, transients and will not or cannot register to vote in Hawaii. The military may register and vote if they qualify. The Constitution and laws of Hawaii do not *per se* exclude the military from establishing residence in Hawaii and thereafter becoming eligible to vote. The District Court found that the registration procedure does not discriminate against any class of persons. The use of the registered voter basis reflects population as envisioned by the Hawaii Constitutional Convention and comports with the equal population principle.

D. The District Court found that the multi-member districting of the House of Representatives was not invidious and followed along historical, political, geographic and

physical lines and that the apportionment was not the result of arbitrary and capricious action. Limitless possibilities exist in districting and apportionment that comport with the Equal Protection Clause, and the Governor's mere suggestion that other possibilities than the one adopted by the Constitutional Convention existed does not prove arbitrary and capricious action. Choice by the Constitutional Convention or Legislature as to one rational plan over another or more rational plans is not arbitrary action in the invidious sense.

Without a demonstration of invidious discrimination, the contention by the Governor that a person in a multi-member district has inordinate political advantage over a person in a single-member district because of the difference in numbers of legislators representing such persons is speculative. Conjecture based on political theory falls short of showing invidious discrimination.

As urged by the Governor, multi-member districts submerge minorities therein. There is no showing in the record to indicate who the minorities are and in what fashion they were invidiously discriminated against. Again the assertion of submergence is founded on speculation.

E. The District Court in its Order of April 28, 1965, disapproved the Senate plan declaring that the plan failed to meet federal constitutional requisites. The Governor contends that even if the Senate plan had not been violative of the Fourteenth Amendment, the District Court's refusal to approve should be sustained. While the District Court has a wide range of discretion in fashioning decrees to remedy malapportionment, judicial relief becomes appropriate only when a legislature has failed to reapportion according to federal constitutional requisites. *Reynolds* v. *Sims*, 377 U.S. 533, 586 (1964).

ARGUMENT

I. THE ERRORS OF THE DISTRICT COURT

In this Part I we brief the appeal of Elmer F. Cravalho, *et al.*, in No. 323. In Part II we will brief the issues on which Elmer F. Cravalho, *et al.*, stand as appellees.

A. The Equal Protection Clause Does Not Necessarily Require That the Hawaii Senate Be Apportioned In Accordance With a Rule of Single-Member Districts Notwithstanding That the Hawaii House of Representatives Is Composed of Single-Member and Multi-Member Districts. Absent Any Showing of Invidious Discrimination, Multi-Member Districts Are Valid In Both Houses.

The court below demanded that because Hawaii had a multi-member district House, the Senate should be redistricted into single-member districts, and any other than single-member senatorial districting would have to be justified by the Hawaii Legislature. (R. 154; 240 F. Supp., at 726)[6] The court below further ultimately indicated that the single-member rule was the "means by which the senate could be apportioned to give to every voter the equal protection and equal representation that he is entitled to without disturbing the makeup of the house." (R. 162; 240 F. Supp., at p. 731)

There is no such inflexible rule that requires one house of the legislature to be districted into single-member districts simply because the other house is composed of multi-member districts. Single-member districts may be the rule in one State, while another State might desire to achieve some flexibility by creating multi-member or floterial dis-

[6] See also Memorandum, Appendix B, pp. 21a-22a.

tricts. *Reynolds* v. *Sims*, 377 U.S. 533, 579 (1964). In *Lucas* v. *Colorado General Assembly*, 377 U.S. 713 (1964) this Court stated: "We do not intimate that apportionment schemes which provide for at-large election of a number of legislators from a county, or any political subdivision, are constitutionally defective. Rather, we merely point out that there are certain aspects of electing legislators at large from a county as a whole that might well make the adoption of such a scheme undesirable to many voters residing in multi-member counties." 377 U.S. 713, 731, n. 21.

Thus the issue with respect to multi-member districts is not constitutionality but desirability. The question of desirability is not for the courts but for the legislature or a constitutional convention authorized to reapportion and redistrict. The Hawaii Legislature in enacting the reapportionment plan constructed multi-member districts, the reasons for which were expressly set forth in the committee report (R. 130-39) and testified to by Senator Sakae Takahashi. (R. 296-99) The plan as submitted should not be disapproved as unconstitutional on its face simply because it did not adhere strictly to a rule of single-member districting.

In *Fortson* v. *Dorsey*, 379 U.S. 433 (1965), this Court reversed the judgment of the District Court which was based on the alleged infirmity that attached to the statute on its face. The Court reaffirmed the constitutionality of multi-member districts and expressly "rejected the notion that equal protection necessarily requires the formation of single-member districts," but emphasized: "It might well be that, designedly or otherwise, a multi-member constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population. When this is demonstrated it will be time enough

to consider whether the system passes constitutional muster." 379 U.S. 433, 439.

In the light of *Fortson* v. *Dorsey,* 379 U.S. 433 (1965), multi-member districts are valid, absent any showing of invidious discrimination. Similarly, the Senate plan composed of multi-member districts is valid, should not be subjected to any single-member district rule and should command constitutional validity, unless and until there is showing of invidious discrimination in and of itself or as a complement to the scheme of representation employed with respect to the House.

The court below places the burden of justifying multi-member districts on the Hawaii Legislature (R. 154; 240 F. Supp., at 726), and in condemning the Legislature in falling short of justifying the multi-member districts (R. 163; 240 F. Supp., at 731), cites *Butcher* v. *Bloom,* 415 Pa. 438, 203 A. 2d 556 (1964), which approaches the matter of apportionment "by setting up single-member districts unless valid and compelling reasons exist which require the creation of some multi-member districts." (R. 163; 240 F. Supp., at 731)

If the court below interprets *Butcher* v. *Bloom, supra* as authority that the Legislature has the burden of justifying multi-member districts, that case is not controlling in the light of *Fortson* v. *Dorsey,* 379 U.S. 433, 439, which holds that a reapportionment plan involving multi-member districts is not unconstitutional *per se* and places the burden of establishing that the multi-member districting scheme operates to minimize or cancel out the voting strength of racial or political elements of the voting population on the party challenging the plan. The record does not support the Governor as having fulfilled that burden.

The record is barren of any evidence indicating that the voting strength of any particular person or groups of persons was in any way minimized or cancelled out. There was evidence showing the heterogeneity of districts, and the court below made capital emphasis of the racial and socio-economic heterogeneity within certain senatorial districts, *e.g.* the sixth senatorial district (which included the fifteenth representative district) with a concentration of Japanese in the Moiliili area and Caucasians in Waikiki with the high level professonal, technical and managerial people tending to live in Waikiki or upper Manoa and the laborers, clerical workers, middle and lower-income people tending to concentrate in the central (Moiliili, etc.) area; the fifth senatorial district with its multitude of Caucasian widows in the upland area and an overabundance of Filipino males in the seaward portion of the district; and the seventh senatorial district (which included the sixteenth and seventeenth representative districts) with the high income professionals in Waialae-Kahala and the low income laborers and clerical workers in the Palolo area. (R. 157-58; 240 F. Supp., at 728-29) Nothing can be gleaned from the evidence to indicate which of the racial or socio-economic groups or the various blends of such groups is the minority in which of the districts or whose voting strength was cancelled out or diluted, if at all.[7] The Governor baldly asserts and argues on the presumption, and the court below agreed, that the wide divergence in the character and interests of the population from the standpoint of race, occupation, income grouping and interests necessarily results in the invidious "submer-

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[7] Consider the possibility of a racial minority being among the wealthy majority, or part of a racial majority being among the lower income minority in a district. Quite obviously limitless possibilities exist in defining a "minority" group when one considers additional factors such as sex, occupation, political status, etc.

gence" of someone or some group. (R. 335) The clear inference is that the plan is defective because heterogeneous districts *could* submerge a particular racial or socio-economic group so as to nullify that group's choice and thrusting upon it a senator for whom no one in the group had voted resulting in a futile and illusory exercise of its valuable franchise.

In *Fortson* v. *Dorsey*, 379 U.S. 433 (1965) Georgia's Reapportionment Act of 1962 provided for 54 senatorial districts and apportioned the 54 seats of the senate among the State's 159 counties. All were single-member districts except that, where more than one senator was assigned to a single county, all senators were to be elected at large, thereby resulting in single-member and multi-member constituencies. The opponents of the Act asserted that the scheme was defective because county-wide voting in multi-member district counties could, as a matter of mathematics, result in the nullification of the unanimous choice of the voters of a district, thereby thrusting upon them a senator for whom no one in the district had voted. This Court rejected that argument as hypothetical which ignored the practical realities of representation in a multi-member constituency and stated: "It is not accurate to treat a senator from a multi-district county as the representative of only that district within the county wherein he resides. . . . [S]ince his tenure depends upon the county-wide electorate he must be vigilant to serve the interests of all the people in the county, and not merely those of the people in his home district; thus in fact he is the county's and not merely the district's senator." *Fortson* v. *Dorsey*, 377 U.S. 433, 438 (1965). Analogously a senator from a district with multi-racial and multi-socio-economic groups whose members live together in clearly defined areas, freely or fortuitously, in their respective groups, should not be treated as a representative of only such group or groups

to which he happens to belong. Since his tenure depends upon the district-wide electorate, he must serve the interests of all the people in his senatorial district, and the minority veto—the power of the stalemate—possessed by each of the diverse groups could well deter and prevent the political disaffection of diverse groups within the district.

This Court's decisions on reapportionment[8], requiring equal weight to be assigned to each man's vote, in a very important sense, improve the nature of representation within the democratic context. Equally weighted votes do not, in themselves, however, guarantee a perfect or even a good system of representation. Numerical parity is one, perhaps the most important, but only one of several interrelated factors which can be ordered in a variety of ways to obtain representative government.[9] Other factors include the matters here in issue being the type of districts—single-member or multi-member or a combination of them—and the nature of a district's population—homogeneous or heterogeneous.

The court below found it necessary to consider the ramifications of numerical parity upon the other factors in a representation system. (R. 161; 240 F. Supp., at 730) Within the democratic context, however, legislative reapportionment is recognized primarily as a matter for consideration and determination by the citizens of the community itself through its representatives to be effected within certain constitutional requisites. *Reynolds* v. *Sims*, 377 U.S. 533, 586 (1964).

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[8] *Reynolds* v. *Sims*, 377 U.S. 533 (1964); *WMCA, Inc.* v. *Lomenzo*, 377 U.S. 633 (1964); *Maryland Committee* v. *Tawes*, 377 U.S. 656 (1964); *Davis* v. *Mann*, 377 U.S. 678 (1964); *Roman* v. *Sincock*, 377 U.S. 695 (1964); *Lucas* v. *Colorado General Assembly*, 377 U.S. 713 (1964).

[9] See De Grazia, Essay on Apportionment and Representative Government, pp. 9-31.

Any community complying with the Court's decisions will be faced with having to make political decisions on other factors affecting its representation system. A community, having the inherent right to make such decisions, should be free to make decisions suited to the community. It should be axiomatic that the shaping and balancing of the major factors in such a way as to produce the most equitable and most effective democratic system is not the same for all political communities or for the same community at different stages during its development.

The theoretical best in state electoral systems for equal weighting of votes may well be proportional representation in state-wide elections. See Stewart, J. in *Lucas* v. *Colorado General Assembly*, 377 U.S. 713, 750, n. 12 (1964). And quite obviously there are limitless alternatives and possibilities for districting consistent with the equal population standard, but a community should have discretion in making political judgments to fulfill its desires and needs, provided that population is the controlling consideration in its legislative apportionment and provided that no one has demonstrated that its apportionment scheme operates to minimize or cancel out the voting strength of racial, political, social or economic elements of the voting population.

The Hawaii Legislature's decision against a rule of single-member districts for the Senate was based on its belief and determination that a representation system consisting solely of single-member districts for the Senate would tend to fragment representation and create representatives responsive only to the problems and needs of a very small part of Hawaii's total population. (R. 123) Fairly included under such a belief would be the related worry that a representation system of single-member districts may tend to encourage the building of personal, small community political machines and discourage representatives from coping with larger prob-

lems of general concern to the State or with large groups within the State. It may inhibit the building-up of coherent political party organizations in Hawaii which may demand some loyalty of individual representatives on major issues. It may also weaken the Hawaii Legislature itself for representatives loyal to different interests and with narrow perspectives may tend to abdicate their responsibility for determining matters of major interests.

The Hawaii Legislature in good faith has divested the less populated areas of their over-representation. It would seem that the Hawaii Legislature could reasonably find it desirable for Hawaii to foster development of legislators with more than provincial interests of a small single-member district at this crucial moment when the rural and agricultural counties of Hawaii, Maui and Kauai are to be divested of ten senate seats which would be allocated to the highly urban and industrial City and County of Honolulu (island of Oahu). (R. 113-14) Upon reapportionment on the basis of population (registered voters), the City and County of Honolulu increases in senate seats from nine to nineteen whereas the counties of Hawaii, Maui and Kauai decrease in such seats from sixteen to six. This drastic shift in senate seats would leave only six senators to represent constituencies of the seven islands of Hawaii, Maui, Molokai, Lanai, Kahoolawe, Kauai and Niihau and nineteen senators to represent the interests of one island of Oahu. It would indeed be a propitious moment to inject that policy which encourages Oahu senators away from provincial interests of small single-member districts toward a sense of state-wide concern.

In addition to its concern against the creation of legislators responsive only to special-interest constituencies in single-member districts, the Hawaii Legislature may well have been prompted to favor heterogeneous districts over homogeneous enclaves as a desired policy to achieve certain

results which heterogeneous districts would accomplish and which the Legislature believed desirable for Hawaii at this particular period of its political development. Legislative districts which encompass diverse racial, social and economic elements are consistent with the democratic ideal and would encourage the various groups to participate in political activities with each other and work together in the political process. *Cf.* Douglas, J. in *Wright* v. *Rockefeller,* 376 U.S. 52, 63-67 (1964). At this stage in Hawaii's political development when the diverse elements are working well together the legislative districts in the Senate plan would further this development.

Heterogeneous districts tend to foster candidates who must be responsible to several group interests diverse on political issues, and the political compromises are effected during the election process. Homogeneous districts tend to foster candidates who are inclined to assume more singular stands on issues concerning a constituency with a provincial outlook. The political compromise process then tends to occur in the legislature rather than during the electoral process. Either system might be desirable at a particular period of a political community's development. The choice as to the desired district is, in large measure, a judgmental decision premised on the criterion of how best to achieve effective representation in a particular state at a particular time. In Hawaii, for example, a candidate running from the Kahala-Aina Haina area would tend to reflect the views of a relatively upper middle-class population. (R. 331) If, however, his district included both higher-income Kahala and lower-income Palolo he would tend to take broader stands to represent both population groups. (R. 331)

It would seem that the Hawaii Legislature could also reasonably find it desirable for Hawaii at this particular period of its political development to continue the traditional expe-

rience of heterogeneous districts, to have political issues determined by political compromises effected during the election process and to have the responsiveness of the legislators to diverse groups checked by the minority veto in a heterogeneous setting. The Legislature may have further reasonably found that the better legislators are bound to emerge from districts that are diverse in their socio-economic characteristics which would demand a legislator who must be conversant with more than a single electoral group and possessed of those skills to persuade and serve the interests of diverse groups. The Hawaii Legislature is presumed to have acted within its constitutional power. If any state of facts reasonably may be conceived to justify the use of multi-member districts which are heterogeneous in characteristics, then the Senate plan should be upheld. *McGowan* v. *Maryland,* 366 U.S. 420, 425-26 (1961). The traditional application of this presumption in the instant case is especially compelling in that nowhere in the record does it expressly appear by testimony or exhibit that the Legislature *did not* consider socio-economic, industrial, occupational, or community of interest factors. While the committee report and Senator Sakae Takahashi's testimony were sparing with respect to a discussion of such factors, the committee report did state that the conference committee sought to preserve the Kalihi community against an alternative of cutting it up. (R. 137) And in his explanation of why the first and eighth precincts of the eleventh representative district were combined with the tenth representative district as part of the proposed fourth senatorial district, Senator Takahashi testified that they "found it to be logical to transfer these two precincts to the 4th Senatorial District because the areas involved are characteristic of the entire 10th District, 10th Representative District. It is not in a solidly urban area." (R. 300-01) In the Senate plan the Legislature chose to

construct districts which encompass heterogeneous constituencies. The Legislature, however, has drawn the encompassing district lines along meaningful natural, political, socio-economic and community boundaries. The fact that Robert Schmitt, who testified to the various demographic characteristics of the proposed senatorial districts (which characteristics had not been covered in the committee report or Senator Takahashi's testimony), had not been consulted (R. 326) should in no way rebut the presumption that such relevant facts were before the Legislature when it enacted the plan. The court below implies the presumption to have been effectively rebutted simply because Robert Schmitt had *not been consulted* (R. 156; 240 F. Supp., at 728), a conclusion bottomed on a hypothetical as it assumes Robert Schmitt to be the sole source of the matters he testified to and foreclosing any possibility that the legislators were independently knowledgeable of such matters.

To present a prima facie case, the opponents of the plan must show that the apportionment is inconsistent with any of the obvious and permissible bases of representation. Frankfurter, J., in *McGowan* v. *Maryland*, 366 U.S. 420, 468, 535 (1961); *Wright* v. *Rockefeller*, 376 U.S. 52, 57 (1964); 72 Yale LJ 968, 996. Without the benefit of the lower court's imposition of the rule of single-member districts, the deviation from which had to be justified with racial, socio-economic and other factors, the record does not support the Governor to have accomplished his prima facie case.

As earlier noted, the Legislature had reapportioned and redistricted the senatorial districts on the basis of population (registered voters), with consideration of existing political subdivisions, natural and historical boundaries, compactness and contiguity. (R. 136) The court below readily acknowledged the use of these bases by the Legislature, (R. 156; 240 F. Supp., 727-28) and approved of them as

proper and permissible bases in districting (R. 161; 240 F. Supp., at 730) except that multi-member districts had to be justified with racial, socio-economic, political and other such factors. No one contended that there was not substantial equality of population, and the court below found and agreed that the Legislature had met that test of substantial equality of population. (R. 155; 240 F. Supp., at 727) Senator Sakae Takahashi testified as to the reasons of the Legislature's choice in selecting multi-member districts over single-member districts (R. 296-97) which reasons had been explicitly set forth in the committee report. (R. 135) He further stated the position taken by the committee that there was "nothing wrong with having multi-member districts in the Senate and multi-member districts in the House." (R. 298) Mr. Robert Schmitt, a statistician, substantiated the rationality of the Senate plan and testified that the district lines followed natural, historical, geographic, census and community lines in logical pattern (R. 320-25) summarizing with the statement: "I would say this senatorial district [plan], as proposed, shows a good deal more logic and meaningfulness than the existing representative district [plan]." (R. 325)

Against all this evidence buttressed by the presumption that the Legislature acted in accord with federal constitutional requisites, the Governor could only present evidence showing certain districts to contain heterogeneous groups divergent in race, wealth, occupation, and interest (R. 329-32), and allude to an inconsistency that the Legislature ignored mountain and lava flows which separated East Hawaii from West Hawaii in combining them into one district (R. 308) and suggest that in the cause of homogeneity other possible alternatives in senatorial districting existed involving the 12th, 13th and 14th representative districts. (R. 309-10) The Governor also showed that certain senators

maintained residences in close proximity (R. 308) suggesting, and the court below found, that political self-preservation of the senators prompted the avoidance of single-member districts which would have left certain incumbent senators to compete head on for a single senatorial seat. (R. 163; 240 F. Supp., at 731) It was also brought out that the Legislature did not consider reapportioning the House when it adopted the Senate plan. (R. 297)

But wherein lies the demonstration of *invidious* discrimination? The burden of showing the Senate plan to be invidiously discriminatory must be sustained by the one who claims such injustice and seeks to have it set aside, and it must be sustained not as a matter of speculation but as a demonstrable reality. *Fortson* v. *Dorsey*, 379 U.S. 433, 437 (1965); *Beck* v. *Washington*, 369 U.S. 541, 558 (1962). It is abundantly clear that a demonstration of invidious discrimination to the satisfaction of the court below in rejecting the plan was based on its own conclusions of law that where the House is based on multi-member districts and found to be valid, invidious discrimination is presumed in a districting plan for the Senate which is composed of multi-member districts (R. 154; 240 F. Supp., at 726), and that "monolithic political units" give majorities within such districts a disproportional monolithic command over entrapped minorities and over other voters in non-monolithic districts (R. 160; 240 F. Supp., at 729-30), the Hawaii Legislature thereby failing to positively complement the Senate plan to the makeup of the House. No conclusion or finding by the court below of invidious discrimination is founded on a clear and persuasive showing that the Senate plan operated to minimize or cancel out the voting strength of identifiable racial or political elements. It is submitted that the evidence adduced against the Senate plan merely suggest the *possibility* of submergence of a minority in a heterogeneous district, and the

possibility of political gerrymander because of the proximity of the residence of certain senators.[10] Such speculation coupled with erroneous conclusions of law fall far short of achieving that difficult burden of demonstrating that quantum of proof required to void a legislative act as repugnant to the Equal Protection Clause.

Further, race is a constitutionally impermissible basis for districting regardless of benefits, harms or motives, and the Legislature was under no duty to consider or justify the plan with racial factors.

Admittedly, some of the senatorial districts contained diverse racial groups with persons of the same or similar ethnic background "ghettoized", by choice or chance, in definitely identifiable areas. (R. 329-30) In addition to population, compactness and contiguity, which bases the court below agreed that the Legislature used in districting the Senate, (R. 156; 240 F. Supp., at 727-28) the court below emphatically stated that "community of interests, community of problems, socio-economic status, political and *racial* factors —each and all must be considered, and . . . the electoral districts be laid out with the totality of those factors having been taken into consideration." (emphasis added) (R. 161; 240 F. Supp., at 730) The court below found that the Legislature failed to adequately consider race and to justify the Senate plan with such factor. (R. 161; 240 F. Supp., at 730) However well meaning the court below may have been in its zeal to accomplish effective representation by requiring the Legislature to show that the plan was subjected to a full exposure of the group dynamics of American politics and

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[10] Even if political self-preservation of the senators prompted the avoidance of single-member districts, political gerrymander is not subject to federal constitutional attack under the Fourteenth Amendment. *Cf. WMCA, Inc.* v. *Lomenzo*, 238 F. Supp. 916 (S.D.N.Y. 1965) *aff'd* No. 85, O.T. 1965, October 11, 1965.

justified by such factors to test the responsiveness of the plan, racial classifications are impermissible. *Brown* v. *Board of Education,* 347 U.S. 483 (1954), *Johnson* v. *Virginia,* 373 U.S. 61 (1963).

This Court has consistently declared racially segregated parks[11], beaches[12] and golf courses[13] unconstitutional. While the issue of impermissible classification by race in the *Brown* and post *Brown* cases arose in the context of obvious racial discrimination, the court below in the instant case presumably would have the Legislature consider the racial factor and would acquiesce to state sponsored racial segregation in districting to promote or preserve political advantage, as opposed to racial discrimination, with a view toward "substantial equality of meaningful representation to each and all of the voters of the State." (R. 161; 240 F. Supp., at 730) Although the racial factor is here obviously intended by the court below to be used as a basis in districting to accomplish a benevolent or positive discrimination to avoid foreclosure or "submergence" of the minorities, the principle enunciated in the *Brown* case is that the Constitution finds no room for racially drawn districts regardless of its motive, benevolent effects or discriminatory harm. 72 Yale LJ 1041, 1051; Douglas, J. in *Wright* v. *Rockefeller,* 376 U.S. 52, 59 (1964).

Arguably, the insistence of the court below that the Legislature "must" consider racial factors may be construed, not as a sponsorship of benign racial segregation, but as a duty on the part of the Legislature to use the racial criterion

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[11] *New Orleans City Park Improvement Ass'n* v. *Detrige,* 252 F.2d 122 (C.A. 5th Cir.) *aff'd* 358 U.S. 54 (1958).

[12] *Dawson* v. *Mayor of Baltimore,* 200 F.2d 386 (C.A. 4th Cir.) *aff'd* 350 U.S. 877 (1955).

[13] *Muir* v. *Louisville Park Theatrical Ass'n,* 202 F.2d 275 (C.A. 6th Cir.) *vacated and remanded,* 347 U.S. 971 (1954).

to affirmatively avoid the constitutional evil of intended racially homogeneous districts. This, however, is not borne out in the light of the lower court's finding, in its order of February 17, 1965, that Keaukaha with its smaller population composed of almost entirely Hawaiian[14] extraction was properly excluded from the Puna district whose larger population was very predominantly of Japanese extraction. (R. 76-77; 238 F. Supp., at 476-77) To do otherwise, the court below stated, would have left Keaukaha with *no* real representation. (R. 77; 238 F. Supp., at 477) Clearly and inescapably, the manner in which the racial factor was considered by the court below leaves no doubt that it regards racial classification as a probative, permissible and necessary basis for districting. The Puna-Keaukaha districting, however, was supported by compelling factors other than race such as contiguity, separate neighborhood and other geographic factors to warrant the separation of Keaukaha from Puna. (R. 76; 238 F. Supp., at 477)

Race is and traditionally has been of constitutional irrelevance. *Edwards* v. *California*, 314 U.S. 160, 185 (1941). Statutory classification by race is by its very nature "odious to a free people whose instructions are founded upon the doctrine of equality." *Hirabayashi* v. *United States*, 320 U.S. 81, 100 (1943). The motives or purposes of the Legislature are entirely irrelevant. *Eubanks* v. *Louisiana*, 356 U.S. 584, 588 (1958).

Hawaii is composed of a multi-racial populace compacted within eight small islands. Races or ethnic groups of Caucasians (R. 329), Japanese (R. 329), Chinese (R. 271), Hawaiians (R. 76) and Filipinos (R. 330) are mentioned in the record as constituting part of Hawaii's population.

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[14] An ethnic group as distinguished from residents or citizens of Hawaii.

The names of the members of the conference committee (R. 111-12) indeed suggest the Senate plan as resulting from the joint effort of legislators with various ethnic backgrounds. While not judicially established, Hawaii has earned a reputation of racial harmony. Statehood for Hawaii in 1959 with its diverse racial peoples was a testament to that tradition and principle of our democratic society that the individual is important, not his race, color or creed. Racial consideration in districting would serve as a divisive force artificially creating and magnifying differences between candidates and voters that are irrelevant in the constitutional sense, See Douglas, J. in *Wright* v. *Rockefeller*, 376 U.S. 52, 66 (1964), a result particularly tragic to the Hawaiian community with its heritage of racial harmony. And given the settled principle that a State may not encourage its citizens "to vote for a candidate solely on account of race," *Anderson* v. *Martin*, 375 U.S. 399, 404 (1964), racial districting should be equally condemned as the state creates that setting, in however a subtle or indirect manner, which tends to limit a voter to vote for his racial kind.

Nor should expedience justify racial classification. To allow for impermissible race classification in districting as an expedient in the light of the possible advantages is to ignore the many subtle consequences attendant in racial districting. The resulting state sponsored political ghetto would foreclose opportunity for one to participate in various political activities with members of another race. The inherent detriment appears no less discriminatory than that injury presumed to result in segregation of schools and parks.[15] Moreover, it is popularly presumed that effective representation would be enhanced in having racial districts

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[15] See Comment, *Wright* v. *Rockefeller* and Legislative Gerrymanders—The Desegregation Decisions Plus a Problem of Proof, 72 Yale LJ 1041, 1052.

where voters can be represented by someone of their own ethnic background who understands their interests, problems and needs.[16] While there may be something to be gained in psychic advantage and satisfaction in allowing a voter to elect one of his racial kind, too often the identity of interest is mistakenly assumed by the color of one's skin. With these uncertain effects of racially segregated voting districts, it appears extremely unwise to even begin to approach consideration of so important a principle as the presumptive or *per se* invalidity of statutes based on race as yielding to situations involving racially segregated voting districts, and particularly in the case at bar, the record of which is wanting in the factual demonstration of any need for and benefit from racially reflective constituencies in the Hawaiian community.

B. The Fact That the Geographical Boundaries of Certain Districts of One House of a Bicameral Legislature Are Identical To, Or Coincide To a Great Degree With, the Geographical Boundaries of Certain Districts of the Other House Does Not Violate the Equal Protection Clause.

According to the District Court, "monolithic" political units violate the Fourteenth Amendment. Where the geographical boundaries of certain districts of one house are identical to, or coincide to a great degree with, the geographical boundaries of certain districts of the other house, this situation results in the so-called monolithic political units. (R. 160; 240 F. Supp., at 729-30)

The District Court held that in order to achieve equality of representation, there should not be any such monoliths in

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[16] As intimated by the court below in its analysis of the Puna-Keaukaha districting. (R. 76-77; 238 F. Supp., at 477)

the reapportionment plan. (R. 160; 240 F. Supp., at 729) The District Court pointed out the monoliths in the Senate plan. (R. 160-61; 240 F. Supp., at 730) The 3rd senatorial district and the 8th representative district are the same. Also, the 6th senatorial district is to a certain extent identical to the 15th representative district.

The District Court condemned monolithic political units for two theoretical defects. (R. 160; 240 F. Supp., at 729-30) First, the monolithic political units would elect senators and representatives responsible to and representing the same constituencies. Second, the majorities in such districts would have a disproportional monolithic command over the entrapped minorities therein. The District Court felt that the monoliths do not provide the necessary cross checking and balancing of the two houses to correct the alleged defects above. We contend that monoliths do not result in the alleged defects nor does the record substantiate such defects.

In the District Court's explanation of the first of the alleged defects, it stated with reference to the 3rd senatorial district and 8th representative district: "Thus from *one* political and geographical unit would be elected four representatives and three senators—seven members of the legislature all responsible to and representing exactly the same constituency!" (R. 160; 240 F. Supp., at 730) First, there is no mathematical disparity in the fact that the voters of the 3rd senatorial district and the 8th representative disrict would elect seven members of the Legislature. Secondly, every voter and every constituency in the State, not only the voters and constituencies in the monolithic districts, would elect senators and representatives, who represent them and who must be vigilant to serve their interests in both houses. *Cf. Fortson* v. *Dorsey*, 379 U.S. 433, 438 (1965).

With reference to the 6th senatorial district and 15th rep-

resentative district, the District Court stated: "Similarly, the sixth senatorial district was fashioned almost entirely from the fifteenth representative district, with the result that from the fifteenth representative unit, *i.e.*, from the dominant three-fourths of the voting population of that senatorial district, would come six representatives and four senators. (31,302 of the senatorial district's total of 40,629 voters reside in the fifteenth representative district)". (R. 160-61; 240 F. Supp., at 730) Here, the District Court indulged in the assumption that the three-fourths of the voting population which reside in the 15th representative district would vote as a monolith to dominate the election of the six representatives and four senators. The assumption is certainly hypothetical in view of the diverse "sub-districts" within that three-fourths of the voting population. (R. 269-72) The District Court also ignored the effect of the additional one-fourth of the voting population on voting alignments within the 6th senatorial district.

With respect to the second of the alleged defects, the District Court does not find and the record does not disclose which are the dominant majorities and which are the entrapped minorities within the monolithic districts. The District Court never specified any dominant majority or entrapped minority in the 3rd senatorial district and 8th representative district. The District Court does make reference to the various groups in the 6th senatorial district and 15th representative district. However, it cannot specify which is the dominant majority and which are the entrapped minorities, if any. The record shows that the 6th senatorial district and 15th representative district encompass diverse "sub-districts." (R. 269-72) Waikiki, the center of tourism in Hawaii is within this area. The people here are short-term residents. They are middle and upper middle class. There is a high percentage of Caucasians. (R. 270-71) This so-

called monolithic unit also includes the McCully and Moiliili sub-district. The people here are largely middle and lower middle class. Occupationally, they are skilled, semi-skilled and clerical workers. There is a high percentage of Japanese residents. (R. 271) Then there is the Kapahulu sub-district, which is comparable to McCully and Moiliili. Racially, however, there are more Hawaiians and fewer orientals. (R. 271) These two districts also encompass the upper Manoa area. The people in this sub-district are professional, technical and managerial. (R. 329) Then there is the Bingham Tract, lower Manoa, St. Louis Heights sub-district, in which there is a large percentage of Chinese, a fair number of Japanese, some Hawaiians and some Caucasians. They are predominantly middle class. There are professionals, semi-professionals and managerial people here. (R. 271-72) The "University Community", around central Manoa, is another sub-district, and, of course, has a high proportion of University faculty and employees, and some students. (R. 272) Another sub-district is Makiki Heights and Tantalus. This area has many of the same characteristics as upper and central Manoa, except that the population density is lower. (R. 272) Manoa, generally, is largely Caucasian with a growing admixture of Chinese and some Japanese. (R. 271)

Even the sub-districts do not enclose strictly monolithic groups. The testimony of Robert Schmitt refers to percentages and proportions of racial, social and economic elements within the sub-districts. (R. 271-72) And the various racial, social and economic classifications overlap, *e.g.*, a person may belong to a racial minority but a social or economic majority. The District Court's assertion that monolithic majorities command entrapped minorities has no foundation in the record.

The Hawaii Legislature constructed the district lines for

these two so-called monolithic districts based on natural and historical boundaries. The key terrain feature which demarcated the 3rd senatorial district and 8th representative district is the Koolau Mountain Range, which sets off the entire "windward" side of the island of Oahu. (R. 136-37) This district has formed a unit since early Hawaiian history. (R. 321) The Hawaii Legislature added a part of the 14th representative district to the 15th representative district to form the 6th senatorial district to increase the number of registered voters for a four-member senatorial district in consistence with the equal population principle. (R. 300) The resulting division between the 6th and 5th senatorial district rationally separates the Kakaako area from the central business district.[17] (R. 323)

The so-called monoliths fail to show that the two houses do not complement each other. If the opponents of the total scheme of legislative apportionment prove an inequity in one house, then such inequity should be balanced in the other house. But if the record does not substantiate any real inequities, cross-checking and balancing are not demanded willy nilly.

C. This Court Should Vacate the District Court's Injunction Against the Legislators From Enacting Any Legislation Until Certain Reapportionment Legislation Satisfactory to the District Court Has Been Passed.

On April 28, 1965, the District Court rejected the Senate plan submitted by the Hawaii Legislature and thereby reinstated its permanent injunction against the parties, including Elmer F. Cravalho, *et al.*, from enacting any legislation until legislation looking toward the convening of a constitu-

[17] Further, the District Court in its February order found that districting for the House of Representatives was not invidious. (R. 75; 238 F. Supp., at 476)

tional convention to propose amendments to the Hawaii Constitution (to be then submitted to the electorate) effecting reapportionment of the Senate, has been passed. (R. 80, 164; 238 F. Supp., at 479; 240 F. Supp., at 732) This injunction is directed against certain parties which include the majorities of both houses of the Hawaii Legislature. At that time the injunction prohibited the legislators from enacting legislation essential for the health and welfare of the people of Hawaii and appropriations legislation for the orderly functioning of State and county governments in the fiscal year beginning July 1, 1965. In view of such emergency, on May 13, 1965, an Application for Stay of this severe remedy was presented to Mr. Justice William O. Douglas. On May 21, 1965, Mr. Justice Douglas granted the stay. The Hawaii Legislature then was able to pass the essential legislation for the fiscal year 1965-66. The stay is to remain in effect pending the issuance of the judgment of this Court.

If the judgment of this Court is that the total scheme of Hawaii legislative apportionment, composed of the present House apportionment and the Senate plan comports with federal constitutional requisites, then the injunction should be vacated as unnecessary. And if the judgment of this Court is that one or both houses are invalid, then the Court should nevertheless vacate the injunction and remand to the District Court for reconsideration of the desirability and need for such a drastic remedy,[18] in light of the decision and rulings of the Court in these consolidated appeals and the situation at the time of the issuance of such judgment. *Cf. Fortson* v. *Toombs*, 379 U.S. 621 (1965). We also respectfully

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[18] According to the Hawaii Constitution the Legislature shall convene in budget session on February 16, 1966. The Legislature must provide appropriations legislation for the fiscal year 1966-67 and any urgency measures necessary in the public interest. Article III, Section 11, Constitution of the State of Hawaii (Appendix A, p. 4a-5a)

suggest to the Court that it might be appropriate that its opinion disapprove any reimposition of such an injunction at a time when it would threaten the severe interference with the machinery of State and county governments which it did at the 1965 session.

II. THE CORRECT DETERMINATIONS OF THE DISTRICT COURT.

A. The District Court Properly Determined the Validity of Certain Provisions of the Hawaii Constitution Relating to Apportionment, Notwithstanding the Invalidity of the Provisions Fixing the Number of Senators Per District.

In its order of February 17, 1965, the District Court declared invalid the provisions of the Hawaii Constitution fixing the number of senators per senatorial district. (R. 79; 238 F. Supp., at 478) The District Court found nothing invidious in the total number of senators, *i.e.*, 25 (R. 66-67, n. 4; 238 F. Supp., at 472, n. 4), nor in the districting of the Senate. (R. 75; 238 F. Supp., at 476) The apportionment of the Hawaii House of Representatives was declared valid. (R. 79-80; 238 F. Supp., at 478-80)

The proper judicial focus, of course, is the total scheme of State legislative apportionment. A District Court, however, acts properly when it states its views to provide guidelines for legislative action. *Reynolds* v. *Sims*, 377 U.S. 533, 586 (1964). It should be left to the District Court's discretion to decide whether it should determine the validity of certain provisions of legislative apportionment, notwithstanding the invalidity of the provisions fixing the number of senators per district. In this case, the legislators of both houses had intervened to make known their views and seek guidelines for the purpose of reapportionment. Under such

circumstances the District Court appropriately determined the validity of the House apportionment and certain other provisions of the Hawaii Constitution relating to apportionment.

Indeed, in *Fortson* v. *Dorsey*, 379 U.S. 433 (1965) this Court has deemed it wise to answer substantial questions relating to Georgia's senatorial reapportionment alone. At that time the apportionment of the Georgia House of Representatives had been declared unconstitutional. *Fortson* v. *Toombs*, 379 U.S. 621, Appendix A at pp. 639-40 (1965).

Thus the three-judge court acted within its discretion in determining the validity of the House apportionment. It was also appropriate for the District Court to declare as a guideline for legislative action that the districting for both houses under the Hawaii Constitution was not invidious. The total number of senators, *i.e.*, 25, of course was not invidious. *Cf. Reynolds* v. *Sims*, 377 U.S. 533, 581, n. 63 (1964).

Further, the District Court properly determined the validity of the House apportionment, because it found that the apportionment of the House of Representatives was severable from the apportionment of the Hawaii Senate. The District Court found that there was no evidence to show that the Constitutional Convention would have apportioned the House in any other way than it did. (R. 66; 238 F. Supp., at 472) The Constiutional Convention thoroughly explored the matter of the size of the two bodies. (R. 66-67, n. 4; 238 F. Supp., at 472, n. 4) The Convention also thoroughly discussed the registered voter basis of apportionment. (R. 68-69; 238 F. Supp., at 473) And as the records of the Constitutional Convention show, the districting, both for the Senate and House of Representatives, followed along historical, political, geographic and physical lines. (R. 75; 238 F. Supp., at 476)

B. The Question Whether the District Court Properly Determined the Validity of Certain Provisions of the Hawaii Constitution Relating to Apportionment, Notwithstanding the Invalidity of the Provisions Fixing the Number of Senators Per District, Is Now Moot.

The Hawaii Legislature has now presented a new total scheme of legislative apportionment. The legislators have enacted the Senate plan to replace the concededly malapportioned Senate under the Hawaii Constitution, and the legislators have always supported the apportionment of the House of Representatives under the Hawaii Constitution, since their intervention in this case. (R. 45-53)

Thus the new Senate plan and the existing House apportionment is now the complete legislative apportionment package for the State of Hawaii. The Governor contends that the District Court's determination of the validity of certain provisions of the Hawaii Constitution relating to apportionment has grossly embarrassed orderly reapportionment in Hawaii. This contention is based on the premise that the complete legislative apportionment package provided by the Senate plan and the existing House of Representatives violates the Fourteenth Amendment. We contend that this complete legislative apportionment is in accord with federal constitutional requisites.

Since the legislators have now presented this complete legislative apportionment for review by this Court, the question whether the District Court properly determined the validity of certain provisions of the Hawaii Constitution relating to apportionment is now moot.[19]

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[19] The District Court's determinations may also be regarded as precatory and advisory. *Cf. Reynolds* v. *Sims*, 377 U.S. 533, 586, n. 68 (1964).

C. The District Court Properly Determined the Validity of the "Registered Voter" Basis For Legislative Apportionment For Hawaii.

The court below held in its February decision that the "use of registered voters as a basis of apportionment did not, in Hawaii, in fact 'designedly or otherwise . . . operate to minimize or cancel out the voting strength of [any] . . . elements of the voting population.'" (R. 75; 238 F. Supp., at 476) It further found that that basis of apportionment when adopted in 1950 and when used for reapportionment in 1959, did in fact at those times result in apportionment substantially on a population basis. (R. 68; 238 F. Supp., at 473)

In asserting that the registered voter basis for legislative reapportionment in Hawaii is an impermissible measure of representation, the Governor reasons that "those who may not vote are still entitled to representation." (Gov. 48) On this we understand the Governor to mean more specifically, and we agree, that those who may not vote may still be counted in the apportionment base. A State may, however, justifiably classify and exclude certain persons from the apportionment base.[20]

The exclusion from the apportionment base is admittedly discriminatory, but the prohibition of the Equal Protection Clause goes no further than the *invidious* discrimination. *Williamson* v. *Lee Optical of Oklahoma, Inc.* 348 U.S. 483, 489 (1955). It is submitted that that point has not been reached here. To be sure, the Governor concedes that discriminatory governmental limitations may be placed on the right to vote to guarantee mature and informed judgment

[20] In *Davis* v. *Mann*, 377 U.S. 678, 691 (1964), the Court held that discrimination against military personnel by excluding them from the apportionment base merely because of the nature of their employment, *without more being shown*, is constitutionally impermissible. Presumably certain exclusions may be permissible if "more" be shown.

by the electorate. (Gov. 48) And a statutory discrimination will not be set aside if any state of facts may be reasonably conceived to justify it. *McGowan* v. *Maryland*, 366 U.S. 420, 425-26 (1961).

The question involved here is to what degree, if at all, the Equal Protection Clause limits Hawaii's freedom to establish appropriate legislative apportionment on a population basis excluding certain classes of people. The apportionment of the Hawaii House of Representatives based on registered voters is substantially based on population.

In *Reynolds* v. *Sims*, 377 U.S. 533 (1964), this Court was not concerned with the problem of defining what it meant by population. That issue was not before this Court. It was merely fortuitous that the apportionment plan for the Alabama House of Representatives provided by the Alabama Constitution required decenniel reapportionment based on inhabitants as ascertained in the decenniel census of the United States. Enroute to its decision and in enunciating the equal population principle, however, the Court referred to the practical impossibility to arrange legislative districts so that each one has an identical number of *residents*, or *citizens*, or *voters*. *Reynolds* v. *Sims*, 377 U.S. 533, 577 (1964). Even if total population is of necessity the starting point for legislative apportionment, the Court suggests tacit acquiescence of a resident, citizen or voter population basis for state apportionment as embraced within the meaning of "population basis" by the Court's use of the terms residents, citizens and voters interchangeably. Accordingly, the Court acknowledged the use of a "citizen population instead of total population, excluding aliens from consideration, for purposes of legislative apportionment." *WMCA, Inc.* v. *Lomenzo*, 377 U.S. 633, 641 (1964).

The Governor further contends that the registered voter basis may be upheld "only if it happens to be an adequate re-

flection of total population—and only as long as it is." (Gov. 43) In the same vein, the District Court in *Ellis* v. *Mayor of Baltimore*, 234 F. Supp. 945 (D. Md. 1964), *aff'd* 4th Cir., October 11, 1965, 34 U.S.L. Wk. 2215, suggests a requirement that the ratio of the number of registered voters to the number of total population be substantially equal among the districts. *Id.*, at 958. But such an inflexible standard of mathematical correlation forecloses a State from rationally ever classifying and excluding certain persons from total population in determining the apportionment base. We do not believe that such a harsh and restrictive standard was intended under the equal population principle. And we contend that the registered voter basis for apportionment in Hawaii substantially and adequately reflects total population not by mathematical correlation between total population and registered voters but by rational and constitutionally permissible exclusions of certain classes of persons from total population. The *Ellis* case, *supra*, was decided on the premise that the population statistic (to which the registered voter statistic was compared) was a fair estimate of total population without issue as to the fairness of the population statistic. In the case at bar, however, one of our contentions is that the federal census population is not a fair estimate of total population in Hawaii because of the significant transient military population which severely distorts the total population statistic.

Not only did this Court note in *WMCA, Inc.* v. *Lomenzo*, 377 U.S. 633 (1964), that New York used citizen population instead of total population, excluding aliens from consideration, for purposes of legislative apportionment, but also demonstrated the arithmetical inequities of the State's apportionment scheme by basing its calculations on citizen population. *Id.*, at 647-51. There was nothing in that opinion intimating that the citizen population base contributed in

any way to the unconstitutionality of the State's scheme, nor was there hint of any concern by this Court that the ratio of citizen population to total population must be substantially equal among the districts before demonstration of arithmetical inequities by calculations based on citizen population could be relevant. *Cf. Buckley* v. *Hoff*, 243 F. Supp. 873 (D. Vt. 1965). Although the question was not before the Court, it is obvious that the Court assumed that New York could classify and exclude aliens from the apportionment base and that such classificatory basis was a rational one and constitutionally permissible. The scrutiny in the instant case should focus, therefore, not on the mathematical quantum or degree of deviations between total population and registered voter population among the districts in Hawaii but on whether or not the classification and exclusion of those who cannot or did not register to vote from the apportionment base are rational and constitutionally permissible in Hawaii's attempt to order an over-all representation system to comport with the equal population principle.

The use of a total population basis in an apportionment plan for Hawaii would unduly weight a voter's vote in his favor simply because he happens to live in an area more populous by virtue of a non-voting and transient population, thereby submerging that assurance to each citizen of an equally effective voice in the election of members of the Hawaii Legislature.

The 1960 federal census definition of population was based on all persons whose normal place or residence was in the State of Hawaii. (R. 209) That census also included: Military personnel stationed ashore in the area, ships' crews (both civilian and military) in ports of the area in question on the census date, regardless of their legal or voting residence or the transient nature (R. 209), persons in transient accommodations (hotels, trailers, camps, etc.) if they

have no regular place or residence or are in the process of changing residence (R. 209-10), local residents temporarily out of the State on business or vacation, students from other areas attending a local university, regardless of legal or voting residence (R. 230 (R. 211)), and inmates of long-term institutions (mental hospitals, prisons, etc.). (R. 216) Thus, the census figures would readily distort the voting strength of the voters of those areas which include many of such usually non-voting and transient persons.

The difficulties attendant in the use of the federal census figures may be particularly unique to Hawaii in that there are large pockets of military and maritime personnel in certain areas constituting a sizeable proportion with respect to the total population within certain legislative districts.[21] As the court below found and acknowledged, "Hawaii has become the United States' military bastion for the entire Pacific and the military population in the State fluctuates violently as the Asiatic spots of trouble arise and disappear." (R. 71; 238 F. Supp., at 474) The United States Census Bureau data covering the military population in Hawaii for the last 25 years, clearly supporting the finding of the court below, are set forth as follows: (Pl. Ex. 15; R. 388, 260)

1940	30,000
1941	48,000
1942	136,000
1943	200,000
1944	407,000
1945	355,000
1946	65,000
1947	38,000
1948	33,000
1949	31,000
1950	21,000
1951	44,000
1952	55,000
1953	48,000
1954	38,000
1955	56,000
1956	58,000
1957	60,000
1958	55,000
1959	56,000
1960	59,000
1961	61,000
1962	79,000
1963	60,000
1964	60,000

[21] Particularly the 8th, 9th, 10th, 11th and 13th representative districts. (Pl. Ex. 16; R. 391, 261).

The fluctuation of seismic proportions around 1944 was, of course, due to World War II after which followed a rapid personnel demilitarization until the military population had been reduced from 407,000 in 1944 to 21,000 in 1950. In the following year, 1951, the number of military personnel doubled and in the year next, 1952, almost tripled the 1950 figure. These were the years of the Korean conflict after which there followed a consistent and sharp reduction in 1954 to 38,000. Again in 1962 the military population of 79,000 represented a 20,000 increase after only two short years over the figure of 1960. It may be mere coincidence that the Viet Nam crisis follows the marked fluctuation in 1962.

The military population figures above do not include the military dependents. If we may assume that there is a reasonable correlation between the fluctuation of the military personnel and their dependents, then there would, of course, be a more pronounced effect of the fluctuation of the military population on the total population.

It is also instructive to note that at least 90% of the military population in 1960 were concentrated in the fifth senatorial district and at least an aggregate of 90% in the eighth, ninth, tenth, eleventh and thirteenth representative districts.[22] (Pl. Ex. 16; R. 391, 261) The transient and fluctuating circumstances of the military personnel would thus render the concept of "population" somewhat elusive in these districts. Total population this year would not, from statis-

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[22] The Governor has pointed out deviations in the per cent registered among the 1960 civilian population. (Gov. 63) It is interesting to note that but for the areas in which the military are concentrated (8th, 9th, 10th, 11th and 13th representative districts) the deviations are slight. This can be more readily appreciated when we calculate the proportion of 1960 Federal Census

tical experience in Hawaii,[23] be total population next year so far as the military population is concerned. The fluctuation in military population is independent from and does not appear to have significant correlation to changes in civilian population so that it can hardly be deemed a temporary imbalance where the military are situate.

The District Court cited a possibility that could lead to absurd results by including the total population so that "areas which normally would have a total population entitling them to but a small percentage of the total number of legislators would suddenly find themselves controlling over 90% of the legislature . . ." (R. 72; 238 F. Supp., at 474-75) Admittedly the example was given in the context of the abnormal wartime situation in Hawaii in 1944, but the Governor does not deny such or similar possibility to a lesser degree.

The Governor has urged single-member districts. (R. 333) Given the present size of the House of Representatives and census population as the numerical base of representation, it would be possible to construct a representative district consisting of a military base or portion thereof which would have almost no voters. (R. 275)

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population registered in Hawaii among the senatorial districts as follows: (Pl. Ex. 1; R. 339)

Sen. Dist.	1960 Registered Voters	1960 Population	Per Cent Registered
1	19,266	44,297	43
2	6,793	17,035	40
3	17,539	42,855	41
4	73,981	182,307	41
5	73,142	318,102	23*
6	11,338	28,176	40

* 90% of the military population in 1960 were concentrated in the 5th senatorial district. (Pl. Ex. 16; R. 391, 261).

[23] Pl. Ex. 15; R. 388, 260.

The use of the population basis in Hawaii not only results in the unintended and egregious results above but spawns another worry which hits at the heart of representation. More specifically the question is posed as to whether the apportionment of additional legislative seats to those areas in which the transient military and their dependents reside will actually result in providing members of these groups with representation in the legislative body or will simply result in weighting more heavily the representation of the registered voters residing in those specific areas. If the 1960 federal census were used as the base, instead of the registered voter basis, the ninth representative district, which includes Schofield Barracks, would be entitled to a greater number of legislative seats[24] based on 42,816 persons of which 11,883 are military personnel (not including military dependents). (Pl. Ex. 16; R. 391) Actually, however, such a district would have a relatively small voting population made up primarily of plantation workers living in and around Wahiawa and small business and professional men of that community serving the military population plus a small number of soldiers and their families who happen to be Hawaii residents. Although speculative, political realism would have the plantation workers and the small businessmen select representatives who would primarily represent their interests over the concerns of the transient military population. The likely result is that one would simply weight the vote of this portion of Hawaii's registered voter population several times that of those voters within a district not favored with the presence of the transient military population. Such

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[24] 1960 registered voters numbered 7,410 in the ninth representative district constituting about 3.6% of the total number of registered voters of 202,059. The total population of the ninth representative district (42,816) was about 6.7% of the total population of the State (632,772). (Pl. Ex. 1; R. 339)

a situation may well court and foster the evolution of "rotten boroughs" where population is large but where there are only a few voters.

The right to have one's vote counted equally with that of every other voter and the right to be counted in the apportionment base are but two sticks in that bundle of a citizen's right to representation. Under the total population basis in the Hawaiian context, the voter's vote is unduly diluted, and under the registered voter basis, the non-voter's representation is diminished by exclusion from the apportionment base. Either basis will diminish, but not invidiously, one avenue of a citizen's right to representation. The choice of either of the bases would be a decisional exercise of the State in its attempt to order that over-all system that would best approach the equal protection ideal in representation. Hawaii has chosen the registered voter basis as one better suited to achieve equitable and meaningful representation under the circumstances peculiar to its community.

The registered voter basis provides a rational basis by which measure a more accurate and fair gauge of total population (non-transients) can be realized in Hawaii. Indiscriminate use of census figures without refinement to adjust to significant number of transients may not be a fair estimate of total population. The transients, who severely distort the population picture, should be excluded from the apportionment base.[25] The registered voter basis is a reasonable measure to identify and separate the transients because of the requirement of one year residence in Hawaii as a precondition to registration. The military personnel have a

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[25] The Governor would agree at least that "[i]f the census figures must be refined in order to obtain a fair estimate of the non-transient population of the State, then this should be done." (Gov. 68)

lower incidence of registration than those of other groups.[26] (Pl. Ex. 14; R. 368, 260) All members of the military are not *per se* excluded from registration as a class.[27] The military who are excluded are not excluded merely because of the nature of their employment but because of the transient circumstances and the fluctuating nature of their lot in Hawaii which disturbs total population and hence the apportionment base to the detriment of the weight of the citizen's vote.

While it happens that the registered voter basis also excludes from the apportionment base (in addition to the civilian transients and military transients) residents of Hawaii who are either ineligible to vote and cannot register or qualified to vote but fail to register, the discrimination to such classes of persons is not invidious. Here the benefit we derive in arriving at a more realistic total population statistic and thereby achieving a more equitable representative system for Hawaii by the use of the registered voter basis far outweighs the discrimination reasonably imposed on those excluded from the apportionment base.

With respect to those residents who are qualified to vote but for their failure to register, their exclusion seems hardly

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[26] Voting qualifications in Hawaii include one year residence in the State (R. 276-77) which probably accounts for low registration among those of the military from other states fulfilling their draft obligations with a short tour of duty of say two years or less in Hawaii. Also many may choose not to seek residence in Hawaii but maintain their original legal and voting residence and vote for candidates in their home states.

[27] Hawaii continues to register such military personnel as are qualified. (R. 280-81) And the District Court found that "if he so desires to become a resident of Hawaii ... there is nothing in the State Constitution or the Hawaii statutes which per se excludes members of the armed forces from establishing their residence in Hawaii and thereafter becoming eligible to vote." (R. 73; 238 F. Supp., at 475)

discriminatory in the light of their opportunity to be included in the apportionment base by the simple act of registration. The District Court found "no scheme in Hawaii's Constitution or in the statutes implementing the exercise of franchise which is aimed at disenfranchising the military or any other group of citizens." (R. 73; 238 F. Supp., at 475) Concerted efforts were made by the office of the clerk of the City and County of Honolulu to register as many persons possible of those so qualified by recruiting volunteer registrars and locating them at various points for the convenience of registrants, by distributing information sheets on registration procedures and locations of registration points, and by public advertisements on registration in the daily newspapers. (R. 278) No more effort is being asked of the citizen for his inclusion in the apportionment base than is required by the State for the inclusion of his name on the voting rolls.

For those persons who are ineligible to vote and cannot register, their exclusion may be reasonably founded not only on expedience but on grounds touching and concerning a State's effort to achieve better forms of representation. The illiterate and the children are included among those persons who are ineligible to vote in Hawaii. (R. 276) The Governor would concede to governmental limitation on the right to vote by the illiterate and the children to guarantee mature and informed judgment by the electorate. (Gov. 48) Exclusion of the illiterate and children from the apportionment base appears no more discriminatory. It may be that the reason to disqualify the illiterate and the children from voting has no apparent relevance to their exclusion from the apportionment base. There is, however, a subtle but important interdependence between the right to vote and the right to be included in the apportionment base. Effective and meaningful representation may not necessarily be achieved

by being counted in the apportionment base without the right to vote. Let us assume, for example, that an additional legislative seat is apportioned to a district as a result of the inclusion of the illiterate and the children, who are disqualified from voting, in the apportionment base. The representative elected to occupy that seat does not, in fact and in the minds of the illiterate and the children, adequately represent their interests. What is the remedy? Unlike a voter who may vote for someone else in the next election, the illiterate and the children have no such remedy and must be resigned to their lot of having a "representative" indifferent to their needs. Representative government surely must include legislators responsive to the constituents and surely must include device and opportunity for a timely check on disaffection of constituents by legislators. The right to vote provides such a check as illustrated above. Meaningful representation to a class of persons is not necessarily achieved simply by their inclusion in the apportionment base. It must be coupled with the right to vote, without which representation can be wholly illusory. As the illiterate and the children are disqualified from voting in Hawaii, the State may well be justified in excluding them from the apportionment base. *Cf. McGowan* v. *Maryland*, 366 U.S. 420 (1961).

It is submitted therefore that not only is the registered voter basis permissible under a legislative apportionment plan but, with respect to the State of Hawaii with its significant transient population, it is far less egregious in its effects on citizens, qualified voters, residents and inhabitants, than any total population basis.

The use of the "registered voters" measure in Hawaii does not invidiously discriminate against any group of persons.

The Governor contends that the "registered voters" measure discriminates invidiously against certain groups, namely, the poor (Gov. 60-61), the illiterate (Gov. 61-62), the

children (Gov. 62) and the military (Gov. 63) by their exclusions from the apportionment base or by their residence in districts of those persons excluded.

The Governor's contentions have a certain emotional appeal, interestingly presented, but only so meritorious. As we have argued and demonstrated earlier, Hawaii may in rational manner exclude certain persons from the apportionment base in the process of devising a representative system for the State. Even if we were to assume without conceding that the use of the registered voter basis must be predicated on a mathematical correlation between registered voter population and total population from district to district, the Governor has not demonstrated that the total population was not adequately reflected as there is nothing in the record showing the total population for the year 1958 to compare with the 1958 registered voter population, the basis on which the present House apportionment occurred in 1959. On this the court below correctly perceived and noted:

> "Plaintiffs urge and have presented figures showing that on the basis of the 1960, 1962 and 1964 population, the house of representatives is malapportioned. To begin with, paraphrasing *Guntert* v. *Richardson*, *supra*, 1950 and 1958 registered voters, and 1960, 1962 and 1964 population, are not comparable figures. The Court does not demand that legislatures be reapportioned annually. *Reynolds* v. *Sims*, *supra*, Subject VIII. This Court, at this time, can only determine if the basis of apportionment, when adopted in 1950 and when used for reapportionment in 1959, did in fact at those times result in apportionment 'substantially on a population basis.'" (R. 68; 238 F. Supp., at 473)

Moreover, the application and relevance of other statistics which the Governor presents are suspect. In attempting to show that the registered voter basis discriminates against

the poor, the Governor cites that among the eligible voters on Oahu with a family income of less than $4,000 only 43.8% were registered while among those in the $15,000 or more bracket, 77.7% were registered. (Gov. 61) In *Griffin* v. *Illinois*, 351 U.S. 12 (1956), which the Governor cites, the defendant, convicted of armed robbery, could not achieve an appeal because of his inability to pay for a transcript necessary to pursue the appeal. The appeal depended on whether or not one could afford the costs thereof. In the instant case, there is no cost involved to registration so that inability to pay is of no consequence. The act of registration in Hawaii can be accomplished with equal facility and opportunity by persons of all economic classes. (R. 276-77) Simply because the proportion of registered persons in the lower economic class turned out to be less than those in the higher is not at all persuasive to show invidious discrimination. It is noted that the Governor chooses not to assert that the registered voter basis discriminates against those with 13 or more school grades whose registration percentage among the eligibles is 58.7% as compared to those with 8 or less school grades whose registration percentage is 73.9%. (Pl. Ex. 14; R. 368, 260).

D. The District Court Properly Held That the Multi-Member Districting of the House of Representatives Comported With the Equal Protection Clause.

The Governor urges that the apportionment of the Hawaii House of Representatives should have been declared unconstitutional because of its multi-member districts. (Gov. 70) In Part I, subpart A, we developed that multi-member districts are valid in both houses, provided that population is the controlling consideration and provided that no one has demonstrated that the apportionment scheme operates to minimize or cancel out the voting strength of racial, political, social and economic elements of the voting population.

The District Court found that the districting of the House of Representatives was not invidious and followed along historical, political, geographic and physical lines. (R. 75; 238 F. Supp., at 476) It also found that the apportionment was not the result of arbitrary and capricious action. (R. 79-80; 238 F. Supp., at 478-79) To be sure, districting and apportionment to achieve substantial equality of population may well be at once rational and arbitrary. In a given situation the legislators may be confronted with two or more rational choices in constructing the district lines. To that extent the legislators perforce arbitrarily make one rational choice over another.

It is contended that, as a matter of political theory, a person in a multi-member district has an inordinate political advantage over a person in a single-member district, and the six-member 15th Representative District is cited as an example. (Gov. 76-77) But there is no showing that the 15th Representative District has displayed inordinate political power as compared with the lesser-member representative districts on Oahu or in the State.

The Governor further contends that the multi-member districts of the House deny equal protection to the minorities therein. (Gov. 80) As we have developed in Part I, subparts A and B, the record does not manifest which minorities, if any, are in fact submerged. The record is also barren of any evidence that any minority has been deprived of a chance to elect a representative. In any event a representative, because his tenure depends on the entire electorate of the district, must be vigilant to serve all the people of the diverse groups in the district which he represents. *Fortson* v. *Dorsey*, 379 U.S. 433, 438 (1965).

Moreover, in *Mann* v. *Davis*, 245 F. Supp. 241 (E. D. Va. 1965), *aff'd sub nom. Burnette* v. *Davis*, Nos. 241, 424, O. T. 1965, October 25, 1965, certain Richmond Negro residents

complained of the multi-member districting of the City of Richmond in both chambers. The City of Richmond was combined with Henrico County to form an eight-member House of Delegates district. The City of Richmond formed a two-member Senate district. These residents contended that such multi-member districting deprived the Negro minority of a chance to elect one of their race to the General Assembly. They contended that the City of Richmond should be divided into five single-member House of Delegates districts and two single-member Senate districts. The District Court held that the Equal Protection Clause does not demand single-member districting in either or both chambers to assure the success at the polls of any racial minority.

E. If the Senate Plan Had Not Been Violative of the Fourteenth Amendment, the District Court Should Have Approved Such Reapportionment.

The District Court in its order of February 17, 1965, declared that the Hawaii Senate was malapportioned and imposed its injunction against the legislators from enacting any legislation until legislation looking toward the convening of a constitutional convention has been passed. (R. 80; 238 F. Supp., at 479) Thereafter the legislators moved the District Court to amend its order to allow the Hawaii Legislature to enact a reapportionment plan to be submitted to the District for its approval. (R. 83-85) The District Court amended its order accordingly. (R. 88-91) On April 28, 1965, the District Court disapproved the reapportionment plan, which the legislature had submitted, and declared that the plan failed to meet federal constitutional requisites. (R. 162-63, 164; 240 F. Supp., at 731, 732) The Governor has argued that even if the Senate plan had not been violative of the Fourteenth Amendment, the District Court's refusal to approve it should be sustained. (Gov. 104)

We contend that the District Court properly used as its test

of approval the Fourteenth Amendment. Reapportionment is primarily a matter for legislative consideration and determination. *Reynolds* v. *Sims,* 377 U.S. 533, 586 (1964); *Maryland Committee* v. *Tawes,* 377 U.S. 656, 676 (1964). Because the legislators are the representatives of their community, they have the primary responsibility to construct a reapportionment plan which they deem will fulfill the desires and needs of the community. In scrutinizing a legislative reapportionment plan, a District Court must not reject such plan because of its own notions of the ideal scheme within federal constitutional limits. The proper test of approval is whether the legislative plan comports with the Equal Protection Clause.

To be sure, the District Court has a wide range of discretion in fashioning decrees to remedy malapportionment. Judicial relief, however, becomes appropriate only when a legislature has failed to reapportion according to federal constitutional requisites. *Reynolds* v. *Sims,* 377 U.S. 533, 586 (1964).

CONCLUSION

For the reasons stated, paragraphs 1, 2 and 3 of the decision and order of the District Court dated February 17, 1965, should be affirmed, and paragraph 4 of said decision and order should be reversed. The decision and order of the District Court dated April 28, 1965, should be reversed; and the Legislature's Senate plan, Act 281, Regular Session 1965, Third Legislature of the State of Hawaii, should be declared valid in accordance with the Equal Protection Clause.

Respectfully submitted,

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APPENDIX A

Constitutional Provisions and Statute Involved

1. Amendment XIV, Section 1, Constitution of the United States.

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. Article III, Sections 1, 2, 3, 4, 5 and 11 of the Constitution of the State of Hawaii.

ARTICLE III

THE LEGISLATURE

Legislative Power

Section 1. The legislative power of the State shall be vested in a legislature, which shall consist of two houses, a senate and a house of representatives. Such power shall extend to all rightful subjects of legislation not inconsistent with this constitution or the Constitution of the United States.

Senate; Districts; Composition

Section 2. The senate shall be composed of twenty-five members, who shall be elected by the qualified voters of the

respective senatorial districts. The districts, and the number of senators to be elected from each, shall be as follows:

First senatorial district: that portion of the island of Hawaii known as Puna, Hilo and Hamakua, five;

Second senatorial district: that portion of the island of Hawaii known as Kau, Kona and Kohala, two;

Third senatorial district: the islands of Maui, Molokai, Lanai and Kahoolawe, five;

Fourth senatorial district: that portion of the island of Oahu lying east and south of Nuuanu Street and Pali Road and the upper ridge of the Koolau Range from the Nuuanu Pali to Makapuu Point and all other islands not specifically enumerated, five;

Fifth senatorial district: that portion of the island of Oahu lying west and north of the fourth senatorial district, five; and

Sixth senatorial district: the islands of Kauai and Niihau, three.

House of Representatives; Composition

Section 3. The house of representatives shall be composed of fifty-one members, who shall be elected by the qualified voters of the respective representative districts. Until the next reapportionment, the representative districts and the number of representatives to be elected from each shall be as set forth in the Schedule.

Reapportionment of House

Section 4. On or before June 1 of the year 1959, and of each tenth year thereafter, the governor shall reapportion the members of the house of representatives in the following manner: The total number of representatives shall first

be reapportioned among four basic areas, namely, (1) the island of Hawaii, (2) the islands of Maui, Molokai, Lanai and Kahoolawe, (3) the island of Oahu and all other islands not specifically enumerated, and (4) the islands of Kauai and Niihau, on the basis of the number of voters registered at the last preceding general election in each of such basic areas and computed by the method known as the method of equal proportions, no basic area to receive less than one member. Upon the determination of the total number of representatives to which each basic area is entitled, such total shall be reapportioned among the one or more representative districts within each basic area on the basis of the number of voters registered at the last preceding general election within each of such representative districts and computed by the method known as the method of equal proportions, no representative district to receive less than one member. Upon any reapportionment, should the total number of voters registered in any representative district be less than one-half of the quotient obtained by dividing the total number of voters registered in the State by the total number of members to which the house is entitled, then, as part of such reapportionment, the basic area within which such representative district lies shall be redistricted by the governor in such manner that the total number of voters registered in each new representative district therein shall be more than one-half of such quotient.

The governor shall thereupon issue a proclamation showing the results of such reapportionment, and such reapportionment shall be effective for the election of members to such house for the next five succeeding legislatures.

Mandamus

Original jurisdiction is hereby vested in the supreme court of the State to be exercised on the application of any regis-

tered voter, made within thirty days following the date specified above, to compel, by mandamus or otherwise, the governor to perform the above duty; and made within thirty days following the date of such proclamation, to compel, by mandamus or otherwise, the correction of any error made in such reapportionment.

Election of Members; Term

Section 5. The members of the legislature shall be elected at general elections. The term of office of members of the house of representatives shall be two years beginning with their election and ending on the day of the next general election, and the term of office of members of the senate shall be four years beginning with their election and ending on the day of the second general election after their election.

* * *

Sessions

Section 11. Regular sessions of the legislature shall be held annually. The governor may convene the legislature, or the senate alone, in special session. All sessions shall be held at the capital of the State. In case the capital shall be unsafe, the governor may direct that any session shall be held at some other place. Regular sessions in odd numbered years shall be known as "general sessions" and regular sessions in even numbered years shall be known as "budget sessions."

Budget Sessions

At budget sessions the legislature shall be limited to the consideration and enactment of the general appropriations bill for the succeeding fiscal year and bills to authorize proposed capital expenditures, revenue bills necessary therefor, urgency measures deemed necessary in the public interest, bills calling elections, proposed constitutional amendments

and bills to provide for the expenses of such session and the special session to be convened thereafter in accordance with the provisions of Section 17 of this article. The legislature may also consider and act upon matters relating to the impeachment or removal of officers. No urgency measure shall be considered unless a statement of facts constituting such urgency shall be set forth in one section thereof and until such section shall have been first approved by each house. The approval of such section and the final passage of such measure in each house shall require a two-thirds vote of all the members to which such house is entitled, taken by ayes and noes and entered upon its journal.

Sessions; Commencement; Duration

Regular sessions shall commence at 10:00 o'clock A.M., on the third Wednesday in February. General sessions shall be limited to a period of sixty days and budget sessions and special sessions to a period of thirty days, but the governor may extend any session for not more than thirty days. Sundays and holidays shall be excluded in computing the number of days of any session.

3. Article XVI, Section 1, of the Constitution of the State of Hawaii.

ARTICLE XVI

SCHEDULE
REPRESENTATIVE DISTRICTS

Description; Number of Members

Section 1. As provided in Section 3 of Article III until the next reapportionment, the representative districts and the number of members to be elected from each shall be as follows:

First representative district: that portion of the island of Hawaii known as Puna, one representative;

Second representative district: that portion of the island of Hawaii known as South Hilo, four representatives;

Third representative district: that portion of the island of Hawaii known as North Hilo and Hamakua, one representative;

Fourth representative district: that portion of the island of Hawaii known as Kau and South Kona and that portion of North Kona, for convenience herein referred to as Keauhou, more particularly described as follows: from a point at the seashore between the lands of Holualoa 1 and 2 and Puapuaa 2 running northeasterly along the boundary of Holualoa 1 and 2 to Puu Lalaau; (2) easterly in a straight line to a point called "Naohueleelua" being the common corner of the lands of Puuanahulu, Kaohe and Keauhou 2nd; (3) southeasterly along the common boundary between Hamakua and North Kona districts to the summit of Mauna Loa; (4) westerly along the common boundary between Kau and North Kona districts to the easterly boundary of South Kona district; (5) northerly and westerly along the boundary between North and South Kona districts to the seashore; and (6) northerly along the seashore to the point of beginning, one representative;

Fifth representative district: that portion of the island of Hawaii known as Kohala and that portion of North Kona not included in the fourth representative district, one representative;

Sixth representative district: the islands of Molokai and Lanai, one representative;

Seventh representative district: the islands of Maui and Kahoolawe, five representatives;

Eighth representative district: that portion of the island of Oahu known as Koolaupoko and Koolauloa, two representatives;

Ninth representative district: that portion of the island of Oahu, for convenience herein referred to as Waialua and Wahiawa and a portion of Ewa known as Kunia and Waipio, more particularly described as follows:

Beginning at the seashore on the boundary between the Ahupuaas of Waimea and Pupukea and following along the North boundary of the Ahupuaa of Waimea to Puu Kainapuaa on the Koolau Range at the junction of the Ahupuaas of Laie, Waimea and Kawailoa, thence southeasterly along the top of the Koolau Range, passing over Puu Pauao and Puu Kaaumakua to the head of Kipapa Gulch, thence down along Kipapa Gulch in all its turnings and windings to Waiahole Ditch, thence southwesterly along Waiahole Ditch in all its turnings and windings to Reservoir No. 31 of the Oahu Sugar Company, thence following a direct line to Puu Palikea on the Waianae Mountain Range, thence northwesterly following along the top of Waianae Mountain Range, passing over Puu Kaua, Puu Kanehoa, Puu Hapapa, Puu Kumakalii, Puu Kalena, Puu Kaala to Puu Pueo, thence westerly along the boundary between the Ahupuaas of Kaena and Keawaula to the seashore at Kaena Point, thence easterly along the seashore to the point of beginning, two representatives;

Tenth representative district: that portion of the island of Oahu, for convenience herein referred to as Ewa (excluding Kunia and Waipio) and Waianae, more particularly described as follows:

Beginning at the seashore at Kaena Point, on the boundary between the Ahupuaas of Kaena and Keawaula, and following along said boundary to Puu Pueo on the Waianae

Mountain Range, thence southeasterly along the top of the Waianae Mountain Range, passing over Puu Kaala, Puu Kalena, Puu Kumakalii, Puu Hapapa, Puu Kanehoa, Puu Kaua to Puu Palikea, thence following a direct line to Reservoir No. 31 of the Oahu Sugar Company, thence northeasterly along the Waiahole Ditch in all its turnings and windings to Kipapa Gulch, thence up along Kipapa Gulch in all its turnings and windings to the top of the Koolau Range, thence southeasterly along the top of the Koolau Range to the boundary between the Ahupuaas of Halawa and Moanalua, thence southwesterly along the boundary between the Ahupuaas of Halawa and Moanalua to the seashore, thence westerly along the seashore to the point of beginning, four representatives;

Eleventh representative district: that portion of the island of Oahu, for convenience herein referred to as Kalihi, more particularly described as follows: from the intersection of Kalihi and Auiki Streets running westerly along Auiki Street to Mokauea Street; (2) southwesterly along Mokauea Street Extension extended to a point on the outer edge of the reef; (3) westerly along the outer edge of the reef to a point on the Moanalua-Halawa boundary; (4) northerly and northeasterly along the Moanalua-Halawa boundary to the top of Koolau Range; (5) southeasterly along the top of Koolau Range to a place called "Puu Lanihuli"; (6) southwesterly along the top of the ridge between the lands of Kalihi, Kapalama and Nuuanu to Kalihi Street; and (7) southwesterly along Kalihi Street to the point of beginning, three representatives;

Twelfth representative district: that portion of the island of Oahu, for convenience herein referred to as upper Nuuanu, more particularly described as follows: from the intersection of King and Kalihi Streets running northeasterly along Kalihi Street to the ridge between the lands of Kalihi,

Kapalama and Nuuanu; (2) northeasterly along the top of said ridge to a point on the Koolau Range called "Puu Lanihuli"; (3) easterly along the top of said Range to Pali Road at the Nuuanu Pali; (4) southwesterly along Pali Road to Nuuanu Avenue and southwesterly along Nuuanu Avenue to School Street; (5) northwesterly along School Street to the center line of the Kapalama Drainage Canal (Waikiki Branch); (6) southwesterly along said Canal to the center line of the main Kapalama Drainage Canal; (7) southwesterly along said Canal to King Street; and (8) northwesterly along King Street to the point of beginning, three representatives;

Thirteenth representative district: that portion of the island of Oahu, for convenience herein referred to as Kapalama, more particularly described as follows: from the junction of the Honolulu Harbor Channel and the reef running westerly along the outer edge of the reef to Mokauea Street Extension extended; (2) northeasterly along Mokauea Street Extension extended to Sand Island Road; (3) northeasterly along Mokauea Street Extension to Auiki Street; (4) easterly along Auiki Street to Kalihi Street; (5) northeasterly along Kalihi Street to King Street; (6) southeasterly along King Street to the center line of the main Kapalama Drainage Canal; (7) northerly along said Canal to the center line of the Kapalama Drainage Canal (Waikiki Branch); (8) northeasterly along said Canal to School Street; (9) southeasterly along School Street to Nuuanu Avenue; (10) southwesterly along Nuuanu Avenue to the sea; and (11) southwesterly along the middle of Honolulu Harbor and Honolulu Harbor Channel to the point of beginning, three representatives;

Fourteenth representative district: that portion of the island of Oahu for convenience herein referred to as Pauoa, more particularly described as follows: from the junction

of the Honolulu Harbor Channel and the outer edge of the reef running northeasterly along the middle of Honolulu Harbor Channel and Honolulu Harbor to the intersection of Queen Street and Nuuanu Avenue; (2) northeasterly along Nuuanu Avenue to Pali Road and northeasterly along Pali Road to the top of the Koolau Range at the Nuuanu Pali; (3) easterly and southerly along the top of the Koolau Range Range to a point called "Puu Konahuanui"; (4) southwesterly along the top of the ridge between the lands of Nuuanu, Pauoa and Manoa to a mountain peak called "Puu Ohia" or "Tantalus"; (5) southwesterly along the top of the ridge between the lands of Makiki and Kalawahine to the intersection of Nehoa Street and Lewalani Drive; (6) southerly along Lewalani Drive and Piikoi Street to Wilder Avenue; (7) easterly along Wilder Avenue to Punahou Street; (8) southerly along Punahou Street to King Street; (9) westerly along King Street to Kalakaua Avenue; (10) southerly along Kalakaua Avenue to the center line of the Ala Wai Canal; (11) westerly along said Canal and along the line of said Canal extended to the outer edge of the reef; and (12) westerly along the outer edge of the reef to the point of beginning, five representatives;

Fifteenth representative district: that portion of the island of Oahu, for convenience herein referred to as Manoa and Waikiki, more particularly described as follows: from the intersection of Kalakaua Avenue and the center line of the Ala Wai Canal running northerly along Kalakaua Avenue to King Street; (2) easterly along King Street to Punahou Street; (3) northerly along Punahou Street to Wilder Avenue; (4) westerly along Wilder Avenue to Piikoi Street; (5) northerly along Piikoi Street to Lewalani Drive; (6) northerly along Lewalani Drive to Nehoa Street; (7) northeasterly along the top of the ridge between the lands of Makiki and Kalawahine to a mountain peak called "Puu

Ohia" or "Tantalus"; (8) northeasterly along the top of the ridge between the lands of Pauoa, Manoa and Nuuanu to a point on the Koolau Range called "Puu Konahuanui"; (9) southeasterly along the top of said Range to a place called "Mt. Olympus"; (10) southwesterly along the top of Waahila Ridge to the top edge of Palolo Valley; (11) southwesterly along the top edge of said Valley to the forest reserve boundary; (12) southwesterly along the southeasterly boundary of St. Louis Heights Tract, Series 2 (File Plan 464) to the southerly boundary of said Tract 100 feet southeasterly from Alencastre Street; (13) southwesterly parallel to and 100 feet from Alencastre Street and St. Louis Drive to Waialae Avenue; (14) westerly along Waialae Avenue to Kapahulu Avenue extended; (15) southerly across Waialae Avenue and along Kapahulu Avenue to Kalakaua Avenue; (16) westerly along Kapahulu Avenue extended to the outer edge of the reef; (17) northwesterly along the outer edge of the reef to a point on the line extended of the center line of the Ala Wai Canal; and (18) easterly along said line to the point of beginning, six representatives;

Sixteenth representative district: that portion of the island of Oahu, for convenience herein referred to as Kaimuki and Kapahulu, more particularly described as follows: from a point at the seacoast at a place called "Black Point" running westerly along the seacoast to Kapahulu Avenue extended to the sea; (2) easterly across Kalakaua Avenue and easterly and northerly along Kapahulu Avenue to Waialae Avenue; (3) easterly along Waialae Avenue to a point 100 feet easterly of St. Louis Drive; (4) northeasterly across Waialae Avenue then parallel to and 100 feet from St. Louis Drive and Alencastre Street to the southerly boundary of St. Louis Heights Tract, Series 2 (File Plan No. 464); (5) northeasterly along the southeasterly boundary of said Tract to the forest reserve boundary; (6) northeasterly along the top

ridge of Palolo Valley to the top of Waahila Ridge; (7) northeasterly along the top of Waahila Ridge to a point on the Koolau Range called "Mt. Olympus"; (8) easterly along the top of the Koolau Range to the top of the ridge between the lands of Waialae Nui and Palolo; (9) southwesterly along the top of said ridge to a place called "Kalepeamoa"; (10) southwesterly along Mauumae Ridge to Sierra Drive; (11) southwesterly along Sierra Drive to Waialae Avenue; (12) easterly along Waialae Avenue to 13th Avenue; (13) southwesterly along 13th Avenue and Ocean View Drive to Kilauea Avenue; (14) westerly along Kilauea Avenue to Makapuu Avenue; (15) southwesterly along Makapuu Avenue to Diamond Head Road; and (16) southeasterly along Diamond Head Road to the Military Road and along the Military Road extended to the point of beginning, four representatives;

Seventeenth representative district: that portion of the island of Oahu not included in any other representative district on the island of Oahu together with all other islands not included in any other representative district, three representatives;

Eighteenth representative district: the islands of Kauai and Niihau, four representatives.

Wherever a roadway, or the intersection of one or more roadways, is designated as a boundary in any of the above descriptions, the center line of such roadway or intersection is intended as such boundary.

4. Article XV of the Constitution of the State of Hawaii.

ARTICLE XV

REVISION AND AMENDMENT

Methods of Proposal

Section 1. Revisions of or amendments to this constitution may be proposed by constitutional convention or by the legislature.

Constitutional Convention

Section 2. The legislature may submit to the electorate at any general or special election the question, "Shall there be a convention to propose a revision of or amendments to the Constitution?" If any ten-year period shall elapse during which the question shall not have been submitted, the lieutenant governor shall certify the question, to be voted on at the first general election following the expiration of such period.

Election of Delegates

If a majority of the ballots cast upon such question be in the affirmative, delegates to the convention shall be chosen at the next regular election unless the legislature shall provide for the election of delegates at a special election.

Notwithstanding any provision in this constitution to the contrary, other than Section 3 of Article XIV, any qualified voter of the district concerned shall be eligible to membership in the convention.

Unless the legislature shall otherwise provide, there shall be the same number of delegates to such convention, who shall be elected from the same areas, and the convention shall be convened in the same manner, as nearly as practicable, as required for the Hawaii State Constitutional Convention of 1950.

Organization; Procedure

The convention shall determine its own organization and rules of procedure. It shall be the sole judge of the elections, returns and qualifications of its members and, by a two-thirds vote, may suspend or remove any member for cause. The governor shall fill any vacancy by appointment of a qualified voter from the district concerned.

Ratification; Appropriations

The convention shall provide for the time and manner in which the proposed constitutional revision or amendments shall be submitted to a vote of the electorate, but no such revision or amendments shall be effective unless approved at a general election by a majority of all of the votes tallied upon the question, such majority constituting at least thirty-five percent of the total vote cast at such election, or at a special election by a majority of the total vote tallied upon such quesion, such majority constituting at least thirty-five percent of the total number of registered voters; provided, that no constitutional amendment altering this proviso or the representation from any senatorial district in the senate shall become effective unless it shall also be approved by a majority of the votes tallied upon the question in each of a majority of the counties.

The provisions of this section shall be self-executing, but the legislature shall make the necessary appropriations and may enact legislation to facilitate their operation.

Amendments Proposed by Legislature

Section 3. The legislature may propose amendments to the constitution by adopting the same, in the manner required for legislation, by a two-thirds vote of each house on final reading at any session, after either or both houses shall have given the governor at least ten days' written notice of the

final form of the proposed amendment, or, with or without such notice, by a majority vote of each house on final reading at each of two successive sessions.

Upon such adoption, the proposed amendments shall be entered upon the journals, with the ayes and noes, and published once in each of four successive weeks in at least one newspaper of general circulation in each senatorial district wherein such a newspaper is published, within the two months' period immediately preceding the next general election.

At such general election the proposed amendments shall be submitted to the electorate for approval or rejection upon a separate ballot.

The conditions of and requirements for ratification of such proposed amendments shall be the same as provided in Section 2 of this article for ratification at a general election.

Veto

Section 4. No proposal for amendment of the constitution adopted in either manner provided by this article shall be subject to veto by the governor.

5. Act 281, Regular Session 1965, Third Legislature of the State of Hawaii.

A BILL FOR AN ACT
PROVIDING FOR THE PROVISIONAL REAPPORTIONMENT OF THE SENATE OF THE STATE OF HAWAII

Be it enacted by the Legislature of the State of Hawaii:

Section 1. *Senate; Districts; Composition.* The Senate shall be composed of twenty-five members, who shall be

elected by the qualified voters of the respective senatorial districts. Until the next reapportionment, the senatorial districts, and the number of senators to be elected from each, shall be as follows:

"Senate; Districts; Composition

Section 2. The Senate shall be composed of twenty-five members, who shall be elected by the qualified voters of the respective senatorial districts. Until the next reapportionment, the senatorial districts, and the number of senators to be elected from each, shall be as follows:

First senatorial district: the island of Hawaii, three;

Second senatorial district: the islands of Maui, Molokai, Lanai and Kahoolawe, two;

Third senatorial district: that portion of the island of Oahu consisting of the eighth representative district as described in the Schedule, Article XVI, Section 1, of the Constitution of the State of Hawaii, as amended, three;

Fourth senatorial district: that portion of the island of Oahu consisting of the ninth and tenth representative districts as described in the said Schedule and the first and the eighth precincts of the eleventh representative district as described in the governor's proclamation issued September 11, 1964, for the 1964 general election, four;

Fifth senatorial district: that portion of the island of Oahu consisting of the twelfth and thirteenth representative districts as described in the said Schedule and the second through seventh precincts, inclusive, and the ninth through twelfth precincts, inclusive, of the elev-

enth representative district, and the first through fifth precincts, inclusive, and the eighth, eleventh, fifteenth and sixteenth precincts of the fourteenth representative district as described in the said proclamation, four;

Sixth senatorial district: that portion of the island of Oahu consisting of the fifteenth representative district as described in the said Schedule and the sixth, seventh, ninth and tenth precincts and the twelfth through fourteenth precincts inclusive, of the fourteenth representative district as described in the said proclamation, four;

Seventh senatorial district: that portion of the island of Oahu consisting of the sixteenth and seventeenth representative districts as described in the said Schedule, four;

Eighth senatorial district: the islands of Kauai and Niihau, one."

Section 2. On or before June 1, of the year 1975, and of each tenth year thereafter, the governor shall reapportion the members of the senate in the following manner: The total number of senators shall first be reapportioned among four basic areas, namely, (1) the island of Hawaii, (2) the islands of Maui, Molokai, Lanai and Kahoolawe, (3) the island of Oahu and all other islands not specifically enumerated, and (4) the islands of Kauai and Niihau on the basis of the number of voters registered at the last preceding general election in each of such basic areas and computed by the method known as the method of equal proportions, no basic area to receive less than one member. Upon the determination of the total number of senators to which each basic area is entitled, such total shall be reapportioned among the one or more senatorial districts within each basic area on the basis of the number of voters registered at the

last preceding general election within each of such senatorial districts and computed by the method known as the method of equal proportions, no senatorial district to receive less than one member. Upon any reapportionment, should the total number of voters registered in any senatorial district be less than one-half of the quotient obtained by dividing the total number of voters registered in the State by the total number of members to which the senate is entitled, then, as part of such reapportionment, the basic area within which such senatorial district lies shall be redistricted by the governor in such manner that the total number of voters registered in each new senatorial district therein shall be more than one-half of such quotient, provided, however, that there shall be at least one senatorial district in each basic area.

Upon completion of the reapportionment of the senate as provided herein, the governor shall issue a proclamation showing the results thereof.

Except as otherwise provided hereinafter, the initial reapportionment shall be effective for the election of members to the senate in 1976 and shall remain in effect for succeeding senatorial elections until the next reapportionment takes effect. Except as otherwise provided hereinafter, any subsequent reapportionment shall be effective for the election of members to the senate in the year next following such reapportionment and shall remain in effect for succeeding senatorial elections until the next reapportionment takes effect.

An incumbent senator whose term of office does not expire until the second general election following the date of the proclamation, including any such senator whose seat has been apportioned to another district by reapportionment, shall be allowed to complete his four-year term; provided that when the seat of such holdover senator has been reapportioned to another district, the election to fill the new

seat in the district to which such seat has been newly apportioned shall not be held until the time of the second election following such proclamation.

Original jurisdiction is hereby vested in the supreme court of the State to be exercised on the application of any registered voter, made within thirty days following the date specified above, to compel, by mandamus or otherwise, the governor to perform the above duty; and made within thirty days following the date of such proclamation, to compel, by mandamus or otherwise, the correction of any error made in such reapportionment.

Section 3. The terms of all members of the senate elected or appointed prior to the general election of 1966 shall terminate on the date of the general election of 1966.

Members of the senate elected at the general election of 1966 shall be divided into two classes.

Members of the first class shall hold office for a term of four years beginning with their election and ending on the day of the second general election held thereafter.

Members of the second class shall hold office for a term of two years beginning with their election and ending on the day of the next general election held thereafter.

Upon the expiration of the aforesaid terms of office of members of the respective classes, the term of office of their successors shall be four years.

Of the members to which each senatorial district is entitled, one-half shall be members of the second class. If the total number of senators to which a senatorial district is entitled is not an even number, the number of members of the first class in such district shall be the quotient of said total number divided by two, rounded off to the next whole number. The remainder shall be members of the second class.

Membership in the first and second classes shall be determined by the number of votes cast for each senator in such district. The first class shall consist of those senators, in number corresponding with the number of members of the first class to which such district is entitled, who are elected with the highest number of votes from such district. The remaining senators elected shall constitute the second class.

The senator from a senatorial district that is entitled to one senator shall automatically be a member of the first class.

Section 4. This Act shall take effect upon approval by the Governor of the State of Hawaii and by the United States District Court for the District of Hawaii and shall remain in effect until superseded by constitutional amendment; provided that the regular election of 1966, shall be the first election held pursuant to the provisions herein.

APPENDIX B

Memorandum To Judge Pence From Judge Beeks

MEMORANDUM

To : *Judge Pence* Date: March 31, 1965
From : *Judge Beeks*
Subject : *Holt* v. *Richardson*

I discussed your proposed Decision and Order on Senate Reapportionment Plan of March 18, 1965, and your notes accompanying the same, in a telephone conference with Judge Jertberg on March 29th. Judge Jertberg, because of the fact that he was in Los Angeles without a secretary, asked me to convey to you our joint views, which are as follows:

1. Inasmuch as the Senate Reapportionment Plan of March 18, 1965, is not formally before us, we do not think that any decision and order should be filed because such decision and order would be purely advisory in nature.

2. We believe that the Senate should be redistricted into single senatorial districts, although we may approve two-member districts if, and only if, the legislature can affirmatively show substantial reasons therefor. There may very well be valid reasons for one or two 2-member districts in the neighboring islands but we perceive no justification whatsoever for other than single member districts on the Island of Oahu, particularly the heavily populated areas thereof.

We have no objection whatsoever to your making our views, as above expressed, informally known to all of the

parties but we are opposed to the entry of a written decision and order.

I again discussed this matter with Judge Jertberg, who is now back in Fresno, this morning, read him this memorandum and he signified his approval and concurrence.

It is our suggestion that you discuss the subject matter of this memorandum with counsel for all parties immediately upon receipt of same (I hope you receive it tomorrow) and thereafter arrange a conference call with both of us (Judge Jertberg will be in Fresno) at noon your time on Friday.

cc: *Judge Jertberg*
Fresno, Calif.

SUPREME COURT OF THE UNITED STATES

Nos. 318, 323 AND 409.—OCTOBER TERM, 1965.

John A. Burns, Governor of the State of Hawaii, Appellant, 318 *v.* William S. Richardson et al.	On Appeals From the United States District Court for the District of Hawaii.
Elmer F. Cravalho et al., Appellants, 323 *v.* William S. Richardson et al.	
Kazuhisa Abe et al., Appellants, 409 *v.* William S. Richardson et al.	

[April 25, 1966.]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

This reapportionment case was brought in the District Court of Hawaii by residents and qualified voters of the City and County of Honolulu, appellees in each of the three appeals consolidated here. They alleged that Hawaii's legislative apportionment was unconstitutional under our decisions in *Reynolds* v. *Sims*, 377 U. S. 533, and companion cases.[1] William S. Richardson, Lieutenant Governor of Hawaii, also an appellee in all three appeals, was named defendant in his capacity as the state officer responsible for supervising state elections. John

[1] *WMCA, Inc.* v. *Lomenzo*, 377 U. S. 633; *Maryland Committee* v. *Tawes*, 377 U. S. 656; *Davis* v. *Mann*, 377 U. S. 678; *Roman* v. *Sincock*, 377 U. S. 695; and *Lucas* v. *Colorado General Assembly*, 377 U. S. 713.

A. Burns, Governor of Hawaii, appellant in No. 318, intervened as a party plaintiff. Members of the State House of Representatives, appellants in No. 323, and members of the State Senate, appellants in No. 409, intervened as parties defendant.

Under the Hawaii Constitution, adopted in 1950 and put into effect upon admission to statehood in 1959, the State is divided into four counties, referred to in the State Constitution as "basic areas." Each county is made up of a group of islands, separated from each of the other counties by wide and deep ocean waters. The principal island of the City and County of Honolulu, the most populous county, is the island of Oahu. It is the State's industrial center, principal tourist attraction, and site of most of the many federal military establishments located in the State. In 1960, 79% of the State's population lived there. The three other counties, primarily rural and agricultural, are Hawaii County, Maui County, and Kauai County.[2]

The apportionment article of the State Constitution was framed to assure that the three small counties would choose a controlling majority of the State Senate and that the population center, Oahu, would control the State House of Representatives. Thus, Art. III, § 2 of the State Constitution apportions a 25-member senate among six fixed senatorial districts, assigning a specified number of seats to each. Fifteen senate seats, a controlling majority, are allocated among Hawaii, Kauai and Maui Counties and 10 seats are assigned to Oahu. Alteration of this apportionment is made very difficult by a provision "that no constitutional amendments altering . . . the representation from any senatorial district in the senate shall become effective unless it shall also be

[2] The State's 1960 population of 632,772 was divided among the four counties as follows: Oahu, 500,409, Hawaii County, 61,332, Maui County, 42,855, and Kauai County, 28,176.

approved by a majority of the votes tallied upon the question in each of a majority of the counties." [3] Hawaii Const., Art. XV, § 2, ¶ 6.

For the State House of Representatives, on the other hand, the State Constitution establishes 18 representative districts, 10 of which are on Oahu, and requires the Governor to apportion the 51-member body among these districts on the basis of the number of voters registered in each. The first apportionment occurred in 1959, just prior to statehood, and was based on registration figures for the 1958 territorial election. It produced 13 multi-member representative districts and five single-member districts, and allocated 36 representatives, a controlling majority, to Oahu.[4] The Governor is required to reapportion the State decennially, a duty which may be enforced by mandamus from the State Supreme Court.

This apportionment scheme was first attacked in the Supreme Court of Hawaii, within a month after we decided *Reynolds* v. *Sims*. That court refused to pass on

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[3] The District Court found that "this proviso was specifically inserted in order to freeze representation in the senate, and it gave to the rural counties what amounted to the right of veto over any attempt to change the representative makeup of the senate." 238 F. Supp. 468, 472.

[4] Hawaii uses the method of equal proportions to distribute legislators, first among the four counties and then among the districts within each county. This is the same method as used in apportioning the members of the House of Representatives of the United States Congress. Complex mathematically, it determines a priority order in which legislators are to be assigned among various competing districts. The system is discussed in Schmeckebier, The Method of Equal Proportions, 17 Law & Contemp. Prob. 302 (1952). Use of this method will not necessarily result in a constitutional apportionment. It is the distribution of legislators rather than the method of distributing legislators that must satisfy the demands of the Equal Protection Clause. No claim is made, however, that the effect of applying the method in Hawaii in this case was to deny any person equal protection of the laws by creating representative districts substantially unequal in size.

the validity of the apportionment at that time. It noted the imminence of the 1964 election and stated its belief that, consistently with the Hawaii Constitution, judicial proceedings should await legislative proposals for a constitutional amendment or a constitutional convention. *Guntert* v. *Richardson*, 47 Hawaii 662, 394 P. 2d 444. Compare *Reynolds* v. *Sims*, 377 U. S., at 585. A special legislative session was then called by the Governor to consider reapportionment. It failed to act.

This suit was brought on August 13, 1964. A three-judge court was convened, as required by 28 U. S. C. §§ 2281, 2284 (1964 ed.). Interim relief was denied in view of the pendency of the 1964 elections and hearings were set for January 1965. The court published its first decision and order on February 17, 1965. 238 F. Supp. 468. That order declared all provisions of the apportionment plan contained in the Hawaii Constitution valid under the Equal Protection Clause except the mentioned provisions relating to the apportionment of the State Senate. These were affirmatively declared to be invalid and unconstitutional.

In the February 17 order the District Court decided not to fashion its own reapportionment plan for the senate. Nor did it instruct the legislature to reapportion the senate or to propose constitutional amendments for that purpose.[5] Instead, it directed the legislature to sub-

[5] The court doubted whether the legislature itself had authority under state law to adopt an interim apportionment plan, in view of the decision in *Guntert* v. *Richardson*, *supra*. The Hawaii Constitution authorizes the legislature to propose constitutional amendments to the electorate either upon passage by a two-thirds vote of both houses of the legislature or upon passage by a majority vote of both houses in each of two successive legislative sessions. The Hawaii Constitution also authorizes the legislature to submit to the people the question of calling a constitutional convention, either at a general election or at a special election called for that purpose. Haw. Const., Art. XV, § 3.

mit to the electorate at an immediate special election the question, "Shall there be a convention to propose a revision of or amendments to the Constitution?" The legislature was also directed to establish the convention procedures according to a timetable the court set.[6] The court retained jurisdiction for all purposes, including that of itself reapportioning the senate in the event of a negative vote on the question, failure of the convention to adopt a suitable amendment, or rejection by the electorate of the amendment adopted by the convention.

The court chose the convention route over the legislative route for two reasons. Under the Hawaii Constitu-

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[6] Paragraph 4 of the court's order provided:

"4. This court will not interfere with the convening or conducting of the business of the Third State Legislature in regular session in 1965, save and except that the parties herein are hereby enjoined from taking final action upon any legislation, except such actions as are necessary to organize the respective houses at such session and appropriate funds for the session, until legislation, pursuant to the provision of Article XV of said Constitution providing for the submission to the people of Hawaii, by special election to be held not later than August 1, 1965, the question: 'Shall there be a convention to propose a revision of or amendments to the constitution?', and for any and all acts required by law to implement such legislation, has been enacted into law. Such legislation shall also provide that if the vote be in the constitutional affirmative, then a special election shall be held not later than September 15, 1965 to elect delegates to the convention in the manner provided in the Constitution. Such legislation may include legislative action under Article XV, Section 2, 4th paragraph, of the Constitution. Such legislation shall further provide that the convention convene not later than October 15, 1965 and that it conclude its deliberation in time to submit its proposed constitutional amendments to the electorate of Hawaii at a special election to be held not later than January 30, 1966, including (but not limiting the convention thereto) provisions therein for reapportioning the Senate of Hawaii on a constitutionally valid basis. Such legislation shall also appropriate and make available funds for the expenses of such elections and convention." 238 F. Supp., at 479.

tion all elections necessary to adoption of amendments proposed by a constitutional convention may be held on a special basis. Legislative proposals, on the other hand, may be submitted only at a general election. In starting the machinery necessary for a convention, the court hoped that a valid permanent plan could be presented to the electorate and adopted before the next general election, to be held in 1966. The second reason was that the court doubted that the legislature would be able to agree on an amendment proposal for reapportioning the senate, in view of the failure of the previously called legislative special session to act.

The special elections necessary under the court's order, however, entailed substantial expense. On motion of the intervening legislators, which showed substantial progress towards a legislative proposal for amendment, the court on March 9, 1965, modified its order. As suggested by the parties, it suspended the February 17 order and instead required the legislature to enact three separate statutes before turning to regular legislative business. One statute was to propose an interim senate apportionment plan, using registered voters as a basis, to be submitted to the court. If approved, it would be adopted by the court as its plan for use in the 1966 general election. The second statute was to propose a constitutional amendment embodying pertinent provisions of the interim plan, to be submitted to the people for approval at that election. The third statute was to submit the question of calling a constitutional convention to the electorate at the 1966 general election.

Three statutes were enacted. H. B. 987, the only one of these statutes before us,[7] proposed an interim plan of

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[7] H. B. 986, 1 Hawaii Sess. Laws 1965, Act 280, provides for submission to the electorate in the 1966 general election of the question whether a constitutional convention should be called. H. B. 773, 1 Hawaii Sess. Laws 1965, p. 483, proposing a constitutional amend-

apportionment for the senate. 1 Hawaii Sess. Laws 1965, Act 281. The plan followed the pattern for house apportionment. It established eight senatorial districts, five on Oahu. As required by the court's order, the 25 senators were to be apportioned on the basis of registered voters.[8] Using figures derived from registration for the 1964 general elections, Oahu was allocated 19 out of the 25 senators, a controlling majority.

Under the total apportionment scheme which resulted from this enactment, Oahu would not have any single-member districts in either the house or the senate. The distribution of registered voters in Oahu is such that Oahu's 10 representative districts have two to six representatives each, and its five senatorial districts each would have either three or four senators. Hawaii County would be a single senatorial district represented by three senators and have five representative districts, four choosing a single representative and the fifth electing three. Maui County would be a single senatorial district electing two senators and have two representative districts, one electing four, and the other a single representative. Kauai County would be a single senatorial and a single representative district electing one senator and three representatives. Thus, Oahu with 79% of total population would elect 76% of the senate, 19 of 25 senators, and 71% of the house, 36 of 51 representatives.

The new senate apportionment scheme was submitted to the court immediately upon passage. By decision and

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ment in the same form as the interim plan, was passed by only a majority vote in the senate and hence must be acted on again before it can be submitted to the people for adoption or rejection. See n. 5, *supra*. In view of the constraints placed on the legislature in adopting this proposal, we think the District Court on remand should make no attempt to require any further action on this measure. See pp. 9–11, *infra*.

[8] The method of equal proportions was to be used for apportioning the senate as well as the house. See n. 4, *supra*.

order of April 28, 1965, the District Court disapproved it, and reinstated the provision of its earlier order requiring immediate resort to the convention method.[9] 240 F. Supp. 724. It expressly approved the use of the registered voters measure of population. Its disapproval was based on the legislative decison not to create single-member senatorial districts for Oahu but merely to increase the number of multi-member senatorial districts on that island from two to five. It was not contended that the apportionment failed to meet the standard of *Reynolds* v. *Sims* if the use of multi-member districts and the use of registered voters as the apportionment base did not offend the Equal Protection Clause.[10]

In May 1965, the Governor filed a notice of appeal to this Court from certain provisions of the two orders and thereafter the participating senators and representatives also filed notices of appeal from parts of the orders.[11] We noted probable jurisdiction and consolidated the appeals for argument. 382 U. S. 807. We set aside and vacate both orders and remand for further proceedings consistent with this opinion.

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[9] On May 21, 1965, MR. JUSTICE DOUGLAS stayed this action pending our determination of these appeals.

[10] We are not to be understood as agreeing with the District Court, insofar as it may have rested its decision on the view that use of the method of equal proportions itself saved the plan from constitutional challenge based on *Reynolds* v. *Sims*. 240 F. Supp., at 727. See n. 4, *supra*.

[11] These notices were timely filed. The February 17 opinion was not formally entered until April 9, 1965. The second decision was dated and entered April 28, 1965. Notices of appeal were filed May 3 and 7, 1965. Whether judged by the date of entry, *United States* v. *Hark*, 320 U. S. 531; Fed. Rules Civ. Proc. 58, or by the fact that the order incorporated in the decision of February 17 was not finally made effective until the decision of April 28, *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 177, the appeals from the decision announced February 17 were timely. 28 U. S. C. § 2101 (b) (1964 ed.).

I.

All parties concede the invalidity of the provisions of Art. III, § 2, apportioning the senate on the basis of geography rather than population, and of the provision of Art. XV, § 2, ¶ 6, requiring a majority vote of the electorate in each of a majority of the counties to amend senatorial apportionment established by the constitution. The District Court concluded that, as a matter of state law, the house and senate apportionment plans were severable. Compare *Lucas* v. *Colorado General Assembly*, 377 U. S. 713, 735. Even so, *Maryland Committee* v. *Tawes*, 377 U. S. 656, holds that a court in reviewing an apportionment plan must consider the scheme as a whole. Implicit in this principle is the further proposition that the body creating an apportionment plan in compliance with a judicial order should ordinarily be left free to devise proposals for apportionment on an overall basis. The Governor argues that the District Court committed "fundamental error" in preventing the Hawaiian Legislature from engaging in such deliberations, and that for that reason alone the legislative product was inevitably tinged with constitutional error.

We agree that, once the District Court decided to permit legislative action, it could and should have made clear to the Hawaii Legislature that it could propose modification of the house as well as the senate plan, both as to the interim apportionment to be adopted under court order and as to proposals for permanent reapportionment through constitutional amendment. That approach would have enabled the legislature to channel its efforts to permanent rather than temporary change. Indeed, the failure to invite such thoroughgoing consideration was particularly unfortunate in connection with the court's requirement in its order of March 9 that the Hawaii Legislature prepare constitutional amendments for a permanent apportionment plan. By directing that

the permanent plan incorporate the interim reapportionment plan and by restricting the choices available to legislature in adopting an interim plan, the court put significant restraints on the legislature's deliberations about permanent apportionment. It seemed not only to limit the legislature to consideration of senate apportionment but also to require that a registered voters basis be used for that apportionment. These constraints, together with the District Court's action in explicitly sustaining the constitutionality of the house apportionment in its order of February 17, may have limited the opportunities of the legislature to construct the total scheme of apportionment best suited to the State's needs.[12] Our decision in *Reynolds* v. *Sims* emphasized that "legislative reapportionment is primarily a matter

[12] We have not overlooked the fact that the limitations were suggested by the legislators themselves. Nevertheless, consistently with *Maryland Committee* v. *Tawes*, the District Court should have indicated to the legislators that they possessed the same broad scope of inquiry as the court had said in its opinion of February 17 was open to a constitutional convention. It had suggested there that there might be appropriately considered by the convention:

"1. Whether [Hawaii] will continue to use registered voters as the apportionment basis, or change it to State citizen population eligible to vote (i. e., voter population), or citizen population, or total population.

"2. Whether it is better to have one or both houses of the legislature composed of single member representative districts, or to have and justify one or both houses composed, in whole or in part, on multi-member or floterial districts.

"3. Whether decennial reapportionment of either or both houses should be made on or before June 1st of the year preceding the Federal census—as is now the case—or on a date soon after the taking of such census.

"4. Whether the representative district lines should remain substantially as they now are or whether ultimately (i. e., after 1970) there should be redistricting in such a manner that the census tracts and representative districts can be coordinated for the statistical purposes necessary to implement the changes (if any) made in the basis of reapportionment." 238 F. Supp., at 478.

for legislative consideration and determination, and that judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so." 377 U. S., at 586. Until this point is reached, a State's freedom of choice to devise substitutes for an apportionment plan found unconstitutional, either as a whole or in part, should not be restricted beyond the clear commands of the Equal Protection Clause.

We are dealing here, however, only with the interim plan. The State remains free to adopt other plans for apportionment, and the present interim plan will remain in effect for no longer time than is necessary to adopt a permanent plan. The 1966 general elections are imminent, and election machinery must be put into operation before further proceedings could be completed. In this context, the question of embarrassment of state legislative deliberations may be put aside. For present purposes, H. B. 987 may be treated together with the existing house apportionment as a new, overall proposal for interim apportionment. The only question for us is whether, viewing the resulting plan in its entirety and without regard to its history, it falls short of federal constitutional standards. We conclude for reasons to be stated that H. B. No. 987 and the existing house apportionment together constitute an interim legislative apportionment which has not been shown to fall short of federal standards. We direct the District Court to enter an order appropriate to adopt the plan as the court's own for legislative apportionment applicable to the 1966 election, and thereafter until a constitutional permanent plan is adopted, constitutional deficiencies in the interim plan are shown, or another interim plan for reapportionment of the Hawaii Legislature suggested by the legislature is approved by the court.

II.

The April 28 opinion began analysis in terms of the interim senate apportionment plan's effect upon representation in the State's scheme of representation as a whole. The District Court was not concerned with population disparities, however, but with what it considered to be a difference in representational effectiveness between multi-member and single-member legislative districts.[13] In an informal memorandum circulated among the parties in early April, the District Court had advised the legislature of its doubts concerning the validity of a multi-member senatorial districting plan, saying:

> "We believe that the Senate should be redistricted into single senatorial districts, although we may approve two-member districts if and only if the legislature can affirmatively show substantial reasons therefor. There may very well be valid reasons for one or two 2-member districts in the neighboring islands but we perceive no justification whatsoever for other than single member districts on the Island of Oahu, particularly the heavily populated areas thereof."

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[13] "In reapportioning and redistricting the senate, both houses overlooked the fact that, to be valid, the makeup of the senate must positively complement the makeup of the house, to provide the vital equality of voter representation. Both houses of the legislature seemingly forgot that the schemes of districting *each* house, when conjoined, must offer compensating advantages to the voters—not only to those voters within each representative district, be it senate or house, but to all voters throughout the State. While there perforce must be some overlap of representation with the several senate and house districts, that overlap must not be such as to concentrate and intensify the voting power of a single senatorial-representative district to the point that the voters therein have a built-in disproportionate representational advantage over any other voters of the State." 240 F. Supp., at 729.

The opinion of April 28 clearly reveals that the court was still convinced that only single-member senatorial districting on Oahu would be appropriate. It felt, for example, that the legislature had "built monoliths" into the districting scheme by making the boundaries of the third senatorial district and the eighth representative district one and the same, thus enabling the same constituency to elect four representatives and three senators, and by fashioning the sixth senatorial district almost entirely from the fifteenth representative district, from which six representatives and four senators would be elected. It also felt that in setting up the senatorial districts on Oahu the legislature had not taken into account "community of interests, community of problems, socio-economic status, political and racial factors"; and, finally, that "the legislature's adamant insistence on three and four-member senatorial districting was the conscious or unconscious—though not unnatural—reluctance of the affected senators to carve out single-member districts which thereafter would in all probability result in a political duel-to-the-death with a fellow and neighbor senator." 240 F. Supp., at 730–731.

But the Equal Protection Clause does not require that at least one house of a bicameral state legislature consist of single-member legislative districts. See *Fortson* v. *Dorsey*, 379 U. S. 433. Where the requirements of *Reynolds* v. *Sims* are met, apportionment schemes including multi-member districts will constitute an invidious discrimination only if it can be shown that "designedly or otherwise, a multi-member constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population." *Id.*, at 439.

It may be that this invidious effect can more easily be shown if, in contrast to the facts in *Fortson*, districts are large in relation to the total number of legislators, if

districts are not appropriately subdistricted to assure distribution of legislators that are resident over the entire district, or if such districts characterize both houses of a bicameral legislature rather than one. But the demonstration that a particular multi-member scheme effects an invidious result must appear from evidence in the record. Cf. *McGowan* v. *Maryland*, 366 U. S. 420. That demonstration was not made here.[14] In relying on conjecture as to the effects of multi-member districting rather than demonstrated fact, the court acted in a manner more appropriate to the body responsible for drawing up the districting plan. Speculations do not supply evidence that the multi-member districting was designed to have or had the invidious effect necessary to a judgment of the unconstitutionality of the districting. Indeed, while it would have been better had the court not insisted that the legislature "justify" its proposal, except insofar as it thus reserved to itself the ultimate decision of constitutionality *vel non*, the legislature did assign reasons for its choice.[15] Once the District Court had

[14] Appellant Burns concedes in his brief that "[i]n the case of the Hawaii House multimember districts, extensive proofs were not put in as to the details of the submergence of minorities." There may, for example, be merit in the argument that by encouraging block voting multi-member districts diminish the opportunity of a minority party to win seats. But such effects must be demonstrated by evidence.

[15] As stated in the court's opinion, the legislature's proffered justifications were:

"(1) single-member districts would tend to cause the senators therefrom to be concerned with localized issues and ignore the broader issues facing the State, and therefore it might fragment the approach to state-wide problems and programs to the detriment of the State; (2) historically the members of the house had represented smaller constituencies than members of the senate, and tradition and experience had proved the balance desirable; (3) multi-member districts would increase the significance of an individual's vote by focusing his attention on the broad spectrum of major community problems as opposed to those of more limited and local

decided, properly, not to impose its own senate apportionment but to allow the legislature to frame one, such judgments were exclusively for the legislature to make. They were subject to constitutional challenge only upon a demonstration that the interim apportionment, although made on a proper population basis, was designed to or would operate to minimize or cancel out the voting strength of racial or political elements of the voting population.[16]

III.

The dispute over use of distribution according to registered voters as a basis for Hawaiian apportionment arises

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concern; (4) to set up single member districts would compound the more technical and more intricate problem of drawing the boundaries; (5) population shifts would more drastically affect the boundaries of many smaller single-member districts—to a greater degree than would be found in larger multi-member districts, citing Oahu's population boom and subdivision development." 240 F. Supp., at 727.

[16] We reject the suggestion that the districts are arbitrarily or invidiously defined. The fact that district boundaries may have been drawn in a way that minimizes the number of contests between present incumbents does not in and of itself establish invidiousness. And we find no support for this suggestion in the present wide variances in size among the Oahu representative districts. This distribution is governed by the population shifts which have occurred since the district boundaries were first defined. In the initial apportionment, the six representative districts comprising the fifth senatorial district each contained two or three representatives—two in the geographically large, relatively rural districts and three in urban districts. The four representative districts comprising the fourth senatorial district contained three to six representatives; these districts comprised the heart of residential Honolulu, and were understandably compact. Whether one surmises that the drafters were leaving room for expansion in the less populous districts or drawing district lines as a function of size as well as population, no irrationality appears from the distribution. It is relevant to note that the Hawaii Legislature was dominated by multi-member districts in both houses before statehood. This feature thus did not originate with the senate plan here under consideration.

because of the sizable differences in results produced by that distribution in contrast to that produced by the distribution according to the State's total population, as measured by the federal census figures. In 1960 Oahu's share of Hawaii's total population was 79%. Its share of persons actually registered was 73%. On the basis of total population, Oahu would be assigned 40 members of the 51-member house of representatives; on the basis of registered voters it would be entitled to 37 representatives.[17] Probably because of uneven distribution of military residents—largely unregistered—the differences among various districts on Oahu are even more striking. For example, on a total population basis, Oahu's ninth and tenth representative districts would be entitled to 11 representatives, and the fifteenth and sixteenth representative districts would be entitled to eight. On a registered voter basis, however, the ninth and tenth districts claim only six representatives and the fifteenth and sixteenth districts are entitled to 10.[18]

The holding in *Reynolds* v. *Sims*, as we characterized it in the other cases decided that day, is that "both houses of a bicameral state legislature must be apportioned substantially on a population basis." [19] We start with the proposition that the Equal Protection Clause does not require the States to use total population figures derived from the federal census as the standard by which this substantial population equivalency is to be measured.

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[17] This figure is calculated using 1960 figures; in the apportionment of 1959 Oahu was assigned 36 representatives, on the basis of 1958 registration figures.

[18] Thus, in 1960, the ninth and tenth districts contained 28% of Oahu's population but only 17% of its registered voters; the fifteenth and sixteenth districts, with only 21% of island population contained 29% of island registered voters.

[19] *E. g., WMCA, Inc.* v. *Lomenzo*, 377 U. S., at 653; *Maryland Committee* v. *Tawes*, 377 U. S., at 674.

Although total population figures were in fact the basis of comparison in that case and most of the others decided that day, our discussion carefully left open the question what population was being referred to. At several points, we discussed substantial equivalence in terms of voter population or citizen population, making no distinction between the acceptability of such a test and a test based on total population.[20] Indeed, in *WMCA, Inc.* v. *Lomenzo*, 377 U. S. 633, decided the same day, we treated an apportionment based upon United States citizen population as presenting problems no different from apportionments using a total population measure. Neither in *Reynolds* v. *Sims* nor in any other decision has this Court suggested that the States are required to include aliens, transients, short-term or temporary residents, or persons denied the vote for conviction of crime or for mental illness, in the apportionment base by which their legislators are distributed and against which compliance with the Equal Protection Clause is to be measured.[21] The decision to include or

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[20] Thus we spoke of "[t]he right of a citizen to equal representation and to have his vote weighted equally with those of all other citizens . . . ." *Reynolds* v. *Sims*, 377 U. S., at 576. We also said: "[I]t is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters." *Id.*, at 577. "[T]he overriding objective must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State." *Id.*, at 579.

[21] In *Davis* v. *Mann*, 377 U. S., at 691, we rejected an argument that underrepresentation of three political subdivisions in Virginia was "constitutionally justifiable since it allegedly resulted in part from the fact that those areas contain large numbers of military and military-related personnel. Discrimination against a class of individuals, merely because of the nature of their employment, without more being shown, is constitutionally impermissible." See also *Carrington* v. *Rash*, 380 U. S. 89. Where the exclusion is of those not meeting a state's residence requirements, however, different prin-

exclude any such group involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere. Unless a choice is one the Constitution forbids, cf., *e. g., Carrington* v. *Rash,* 380 U. S. 89, the resulting apportionment base offends no constitutional bar, and compliance with the rule established in *Reynolds* v. *Sims* is to be measured thereby.

Use of a registered voter or actual voter basis presents an additional problem. Such a basis depends not only upon criteria such as govern state citizenship, but also upon the extent of political activity of those eligible to register and vote. Each is thus susceptible to improper influences by which those in political power might be able to perpetuate underrepresentation of groups constitutionally entitled to participate in the electoral process, or perpetuate "a ghost of prior malapportionment." [22] Moreover, "fluctuations in the number of registered voters in a given election may be sudden and substantial, caused by such fortuitous factors as a particularly controversial election issue, a particularly popular candidate, or even weather conditions." *Ellis* v. *Mayor & City Council of Baltimore,* 352 F. 2d 123, 130 (C. A. 4th Cir. 1965).[23] Such effects must be particularly a matter of concern where, as in the case of Hawaii apportionment, registration figures derived from a single election are

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ciples apply. The difference between exclusion of all military and military-related personnel, and exclusion of those not meeting a state's residence requirements is a difference between an arbitrary and a constitutionally permissible classification.

[22] *Buckley* v. *Hoff,* 243 F. Supp. 873, 876 (D. C. D. Vt. 1965).

[23] *Ellis* disapproved a registered voters basis for apportioning the governing council of Baltimore, Maryland. The Court of Appeals held that this basis was permissible only if it yielded results substantially approximating those obtained by use of a total population base.

made controlling for as long as 10 years. In view of these considerations, we hold that the present apportionment satisfies the Equal Protection Clause only because on this record it was found to have produced a distribution of legislators not substantially different from that which would have resulted from the use of a permissible population base.

As the District Court noted, the 1950 constitutional convention discussed three possible measures, total population, state citizen population, and number of registered voters, in considering how the State House of Representatives should be apportioned. Apportionment under the Organic Act had been on the basis of citizen population; this had proved difficult to administer because statistics were not readily available. Total population was disfavored because the census tracts, by which it is determined and reported, did not necessarily comport with traditional local boundaries. Registered voters was chosen as a reasonable approximation of both citizen and total population—readily determinable, conveniently broken down by election district, and a measure which, as against total population, somewhat favored the other islands over Oahu. It is fair to say that the convention report reflected that citizen population as much as total population was the basis against which a registered voters standard was compared.

Hawaii's special population problems might well have led it to conclude that state citizen population rather than total population should be the basis for comparison. The District Court referred to the continuing presence in Hawaii of large numbers of the military: "Hawaii has become the United States' military bastion for the entire Pacific and the military population in the State fluctuates violently as the Asiatic spots of trouble arise and disappear. If total population were to be the only acceptable criteria upon which legislative representation

could be based, in Hawaii, grossly absurd and disastrous results would flow . . . ." 238 F. Supp., at 474.[24] Similarly, the court referred to the distortion in census figures attributable to "the large number of tourists who continually flow in and out of the State and who . . . for census purposes are initially at least, counted as part of Hawaii's census population . . . ." *Id.*, at 475. (Footnote omitted.) Both the tourists and the military tend to be highly concentrated on Oahu and, indeed, are largely confined to particular regions of that island. Total population figures may thus constitute a substantially distorted reflection of the distribution of state citizenry. If so, a finding that registered voters distribution does not approximate total population distribution is insufficient to establish constitutional deficiency. It is enough if it appears that the distribution of registered voters approximates distribution of state citizens or another permissible population base.

Because state citizen population figures are hard to obtain or extrapolate, a comparison of the results which would be obtained by use of such figures with the results obtained by using registered voter figures is difficult But the District Court found that military population of Oahu, and its distribution over that island, was sufficient to explain the already noted differences between total population and registered voters apportionments, both as among Hawaii's four counties and as among Oahu's representative districts. The District Court noted "that there

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[24] For example, at one point during World War II, the military population of Oahu constituted about one-half the population of the Territory. If total population were used in such a situation, the permanent residents living in districts including military bases might have substantially greater voting power than the electors of districts not including such bases. Indeed, in view of this possibility, appellant Burns concedes that a "nontransient" figure as well as total population might be used for apportionment purposes.

is nothing in the State Constitution which per se excludes members of the armed forces from establishing their residence in Hawaii and thereafter becoming eligible to vote. This court finds no scheme in Hawaii's Constitution or in the statutes implementing the exercise of franchise which is aimed at disenfranchising the military or any other group of citizens." 238 F. Supp., at 475. No issue was raised in the proceedings before it that military men had been excluded improperly from the apportionment base.[25] Moreover, the District Court stressed that Hawaii's Constitution and laws actively encourage voter registration. A high proportion of the possible voting population is registered,[26] and "strong drives to bring out the vote have resulted in a vote of from 88

[25] Appellant Burns urges here that the apportionment base for the house, registered voter figures from the 1958 general election, is infected by such an exclusion. Hawaii was then a Territory, and registration was governed by 48 U. S. C. § 619 (1958 ed.), which provided: "No person shall be allowed to vote who is in the Territory by reason of being in the Army or Navy or by reason of being attached to troops in the service of the United States." Such a restriction, if imposed by a State, would violate the Equal Protection Clause. *Carrington* v. *Rash*, 380 U. S. 89. The statute no longer applies, but its effect persists in the house apportionment. The number of registered voters in the districts where Oahu's major military bases are located has increased twice as much as registration in the other Oahu districts and more than three times as much as state population since 1958. Reapportionment of the house now on a registered voters basis would work a substantial realignment of the State's representative districts. If it can be shown that this is so principally because military men now have a vote they were once denied, rather than because of simple population shifts, an immediate interim adjustment of house apportionment might be merited. Time does not permit the necessary hearings to be had before the 1966 elections, but such hearings are certainly comprised within the court's authority under its continuing jurisdiction thereafter.

[26] The District Court found the figure to be 87.1%. Even if an asserted error in statistics is corrected, the figure exceeds 80%.

to 93.6% of all registered voters during the elections of 1958, 1959, 1960 and 1962." *Id.*, at 476 (footnote omitted). In these circumstances, we find no demonstrated error in the District Court's conclusion that the apportionment achieved by use of a registered voters basis substantially approximated that which would have appeared had state citizen population been the guide.

We are not to be understood as deciding that the validity of the registered voters basis as a measure has been established for all time or circumstances, in Hawaii or elsewhere. The District Court was careful to disclaim any holding that it was a "perfect basis." We agree. It may well be that reapportionment more frequently than every 10 years, perhaps each four or eight years, would better avoid the hazards of its use. Use of presidential election year figures might both assure a high level of participation and reduce the likelihood that varying degrees of local interest in the outcome of the election would produce different patterns of political activity over the State. Other measures, such as a system of permanent personal registration, might also contribute to the stability and accuracy of the registered voters figure as an apportionment basis. Future litigation may reveal infirmities, temporary or permanent, not established by the present record.[27] We hold that, with a view to its interim use, Hawaii's registered voter basis does not on this record fall short of constitutional standards.

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[27] Note 25, *supra*. An attempt was made to show that registration percentages among low-income residents of Oahu was substantially lower than among other resident groups. It is unclear to what extent these statistics reflect military pay scales. Thus, they may be an unfair representation of state citizen registration patterns. Moreover, no substantial effect in submerging the political voice of this group appears. Of course, this issue may be re-examined should further hearings be held in exercise of the court's continuing jurisdiction.

IV.

Our conclusion that the interim apportionment should apply to the 1966 election requires that the provisions of the order of February 17 mandating an immediate special election on the question of calling a constitutional convention should remain inoperative. The imminence of the 1966 elections precludes any further action pending that event. But the question remains what role the District Court has in bringing about a permanent reapportionment as promptly as reasonably may be after that election. We believe it should retain jurisdiction of the case to take such further proceedings as may be appropriate in the event a permanent reapportionment is not made effective. We note that the electorate will vote at the 1966 election on the question whether a constitutional convention should be convened. We see no reason, however, why the newly elected legislature should either be compelled to propose amendments or be precluded from proposing them. The legislature will doubtless find reason enough to act in the fact that the District Court will retain jurisdiction over the cause to take any action that may be appropriate pending the adoption of a permanent reapportionment which complies with constitutional standards. Such action may include further inquiry into the constitutionality of the present plan in its operation, consideration of substitute interim plans for apportioning the house and senate that might be submitted by the legislature in the event of failure of proposals for constitutional amendment, or judicial apportionment if the present plan is shown to be constitutionally deficient and no acceptable substitute is forthcoming.

The District Court is accordingly directed on remand to enter an appropriate order (1) adopting H. B. No. 987

and the existing house apportionment as an interim legislative apportionment for Hawaii and (2) retaining jurisdiction of the cause for all purposes.

Our judgment shall issue forthwith.

Vacated and remanded.

MR. JUSTICE FORTAS took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES

Nos. 318, 323 AND 409.—OCTOBER TERM, 1965.

John A. Burns, Governor of the State of Hawaii, Appellant, 318 *v.* William S. Richardson et al.	On Appeals From the United States District Court for the District of Hawaii.
Elmer F. Cravalho et al., Appellants, 323 *v.* William S. Richardson et al.	
Kazuhisa Abe et al., Appellants, 409 *v.* William S. Richardson et al.	

[April 25, 1966.]

MR. JUSTICE HARLAN, concurring in the result.

Because judicial responsibility requires me, as I see things, to bow to the authority of *Reynolds* v. *Sims*, 377 U. S. 533, despite my original and continuing belief that the decision was constitutionally wrong (see my dissenting opinion, 377 U. S. , at 589 *et seq.*), I feel compelled to concur in the Court's disposition of this case. Even under *Reynolds*, however, I cannot agree with the rationale, elaborated in Part III of the Court's opinion, by which Hawaii's registered voter base is sustained. As I read today's opinion, registered voter figures are an acceptable basis for apportionment only so long as they substantially approximate the results that would be reached under some other type of population-based scheme of apportionment.

Many difficult questions of judgment, relating both to policy and to administrative convenience, must be

resolved by a State in determining what statistics to use in establishing its apportionment plan. I would not read *Reynolds* as precluding a State from apportioning its legislature on any rational basis consistent with *Reynolds'* philosophy that "people," not other interests, must be the basis of state legislative apportionment. I think apportionment on the basis of registered voters is a rational system of this type, and that it is therefore permissible under *Reynolds* regardless of whether in the particular case it approximates some other kind of a population apportionment.

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MR. JUSTICE STEWART, concurring in the judgment.

At the time *Reynolds* v. *Sims* was decided, I expressed the belief that "the Equal Protection Clause demands but two basic attributes of any plan of state legislative apportionment. First, it demands that, in the light of the State's own characteristics and needs, the plan must be a rational one. Secondly, it demands that the plan must be such as not to permit the systematic frustration of the will of a majority of the electorate of the State." *Lucas* v. *Colorado General Assembly*, 377 U. S. 713, at pp. 753–754 (dissenting opinion).

Time has not changed my views. I still believe the Court misconceived the requirements of the Equal Protection Clause in *Reynolds* v. *Sims* and its companion cases. But so long as those cases remain the law, I must bow to them. And even under those decisions there is surely room for at least as much flexibility as the Court today accords to Hawaii. Accordingly, I concur in the judgment.